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# LIGHT AND AIR.

BY

BANISTER FLETCHER, M.P.

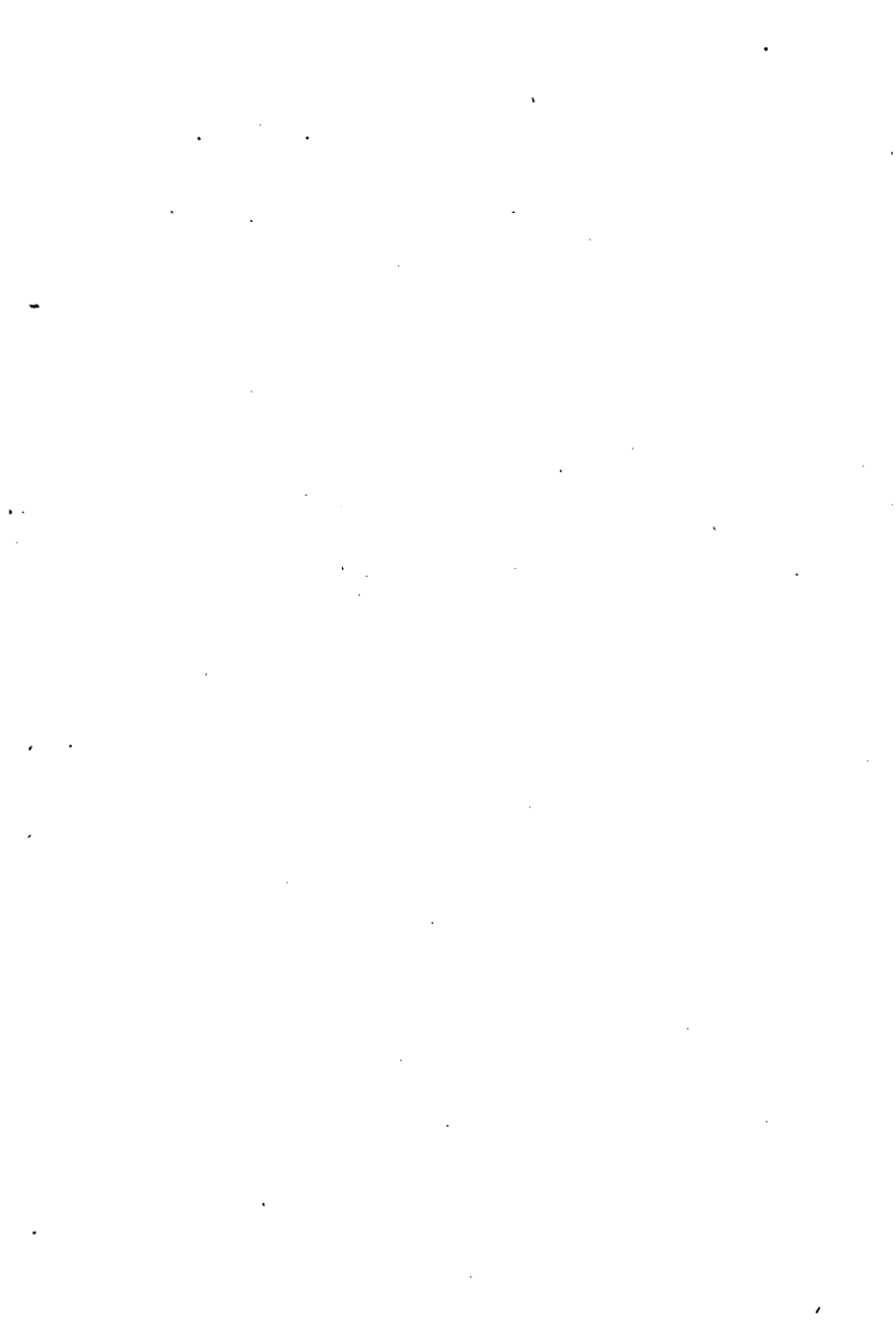
"And thinks no light so cheering  
As that light which heaven sheds."

MOORE.

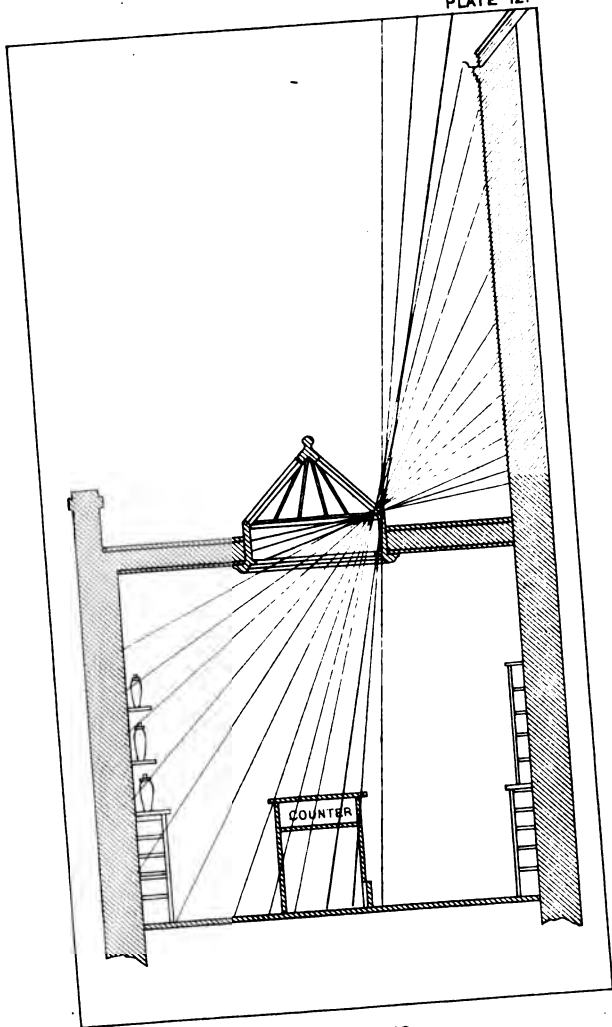
" . . . . the air  
Nimbly and sweetly recommends itself  
Unto our gentle senses."

*Macbeth*, Act i. scene 6.









RED - LOST RAYS.  
 BLUE - RAYs NOT AFFECTED.  
 BLACK - INTERCEPTED RAYS.

## SECTION

✓  
**LIGHT AND AIR:**  
**A TEXT-BOOK FOR**  
**ARCHITECTS AND SURVEYORS.**

**SHOWS IN A TABULATED FORM WHAT CONSTITUTES  
ANCIENT LIGHT; HOW THE RIGHT IS ACQUIRED; HOW THE RIGHT  
MAY BE JEOPARDIZED; HOW THE RIGHT MAY BE LOST; INJURIES TO  
ANCIENT LIGHT FOR WHICH THERE IS NO REMEDY; RELATIVE  
POSITION OF SERVIENT AND DOMINANT OWNERS.**

**ALSO**  
**METHODS OF ESTIMATING INJURIES.**

**AND FURTHER SETS FORTH WHAT THE  
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*Author of "Model Houses," "Compensations," "Arbitrations," "Quantities,"  
"Dilapidations," "Metropolitan Building Acts."*

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**B. T. BATSFORD, 52, HIGH HOLBORN, W.C.**  
**1886.**



## PREFACE

### TO THE SECOND EDITION.

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It must ever be a source of great satisfaction to an author to find another edition of his book demanded, and I have tried to express my appreciation of this demand by endeavouring to make the new edition as complete as possible. I have considered all the cases of importance which have been decided since the first edition was published, and have selected those which are guiding cases and of practical utility, and these I have illustrated with diagrams, thus increasing the number of plates from twelve to seventeen.

I am deeply indebted to my friend, Mr. Edward Uttermare Bullen, the well-known barrister of the Western Circuit, who has kindly devoted much time to revising the legal portion of this edition.

With such advantages, surely this must continue to be the accepted text-book on this subject.

BANISTER FLETCHER.

29, NEW BRIDGE STREET,  
LUDGATE CIRCUS, E.C.  
*April 9, 1886.*

## PREFACE

### TO THE FIRST EDITION.

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THE rapid sale of my last book has induced me to revise and complete this work, which I have had in hand some years.

It forms the last of the series, and the great appreciation by the profession of my former text-book leads me to hope for this the like treatment.

While it is as condensed as possible, I may mention that it contains the result of twenty-four years' experience in "Light and Air," as architect, witness, consulting surveyor, and referee.

BANISTER FLETCHER.

29, NEW BRIDGE STREET,  
LUDGATE CIRCUS, E.C.  
*January 1879.*

## INTRODUCTION.

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I PROPOSE dividing the subject into parts, and giving Tables which I consider are so valuable in condensing information for reference, and which I think my readers highly appreciate.

### PART I.

#### HISTORICAL.

The reader may be tempted to skip this portion ; but I entreat him not to do so, as no one can ever master a subject unless he understands the origin and traces it through its varying phases, and he only who does this will have the faculty of judging the effect of surrounding circumstances on the subject at different times.

### PART II.

#### LIGHT AND AIR.

In this portion I shall give the legal meaning ; quote the portion of the Act of Parliament relating to the subject ; give Tables of those injuries for which there is no legal remedy ; how ancient light is acquired ; Tables of those interferences for which there is a remedy, supporting each Table with copious extracts from the decisions of the judges, including the most recent, taken from the legal writers on this subject, and from the Transactions of

the Royal Institute of British Architects, and from the *Builder*, the *Architect*, the *Building News*, and the *British Architect*—for I have spared no trouble in my endeavour to make this text-book complete up to the present year (1886)—and giving in full detail the most recent important cases.

### PART III.

Will treat of the various methods proposed for estimating the injury, and explanations thereon. Will give diagrams and calculations. The explanatory diagrams will principally be those which I have actually used in supporting my evidence in Court. I also give the present view (as far as can be stated with certainty) held by the Courts.

### PART IV.

#### THE FIGHT.

In this part I shall indicate the course the surveyor should pursue in preparing his case for reference and trial; as to whom he should consult; and I shall further give some typical trials in which I have been engaged, to illustrate the different classes of injury, namely, skylight, front light, and side light.

## CASES CITED AND ACTS REFERRED TO.

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| <p> <b>Act 21 &amp; 22 Vict., c. 27, sec. 2-68</b><br/> <b>Act 2 &amp; 3 Will. 4, c. 71, 68, 70, 83</b><br/> <b>Attorney-General v. Great Northern Railway, 25</b><br/> <b>Aynealey v. Glover, 98</b><br/> <br/> <b>Back v. Stacey, 30, 34, 35, 120</b><br/> <b>Barker v. Richardson, 46</b><br/> <b>Baxendale v. McMurray, 69</b><br/> <b>Blanchard v. Bridges, 47, 69, 73, 74</b><br/> <b>Bland v. Mosely, 1</b><br/> <b>Bostock v. North Staffordshire Railway Company, 24</b><br/> <b>Bowry v. Pope, 1 Leo, 168, 2</b><br/> <b>Bright v. Walker, 46</b><br/> <b>Bryant v. Lefever, 8</b><br/> <br/> <b>Calcraft, v. Thompson, 35</b><br/> <b>Chandler v. Thompson, 26, 46, 67</b><br/> <b>Cherrington v. Abney, 46</b><br/> <b>City of London Brewery Company, The, v. Tennant, 30, 35, 93, 94, 98, 100</b><br/> <b>Clarke v. Clarke, 98</b><br/> <b>Co. Litt. 113 B., 5</b><br/> <b>Coode, Kingdon &amp; Cotton v. The London School Board, 16</b><br/> <b>Cooper v. Hubbuck, 16, 47</b><br/> <b>Cotterell v. Griffiths, 46</b><br/> <b>Courtauld v. Leigh, 26</b><br/> <b>Crofts v. Haldane, 9</b><br/> <b>Curriers' Company v. Corbett, 68</b><br/> <br/> <b>Daniel v. North, 46</b><br/> <b>Darwin v. Upton, 3</b> </p> | <p> <b>Davenport v. Ridsdale, 121</b><br/> <b>Davies v. Marshall, 47</b><br/> <b>Dent v. Auction Mart Company, 95</b><br/> <b>Dickey v. Pfeil, 8</b><br/> <b>Dougall v. Wilson, 46</b><br/> <b>Dyers' Company v. King, 70</b><br/> <br/> <b>Ecclesiastical Commissioners of England v. Kino, 27</b><br/> <b>Evans v. Moss, 82</b><br/> <br/> <b>Flight v. Thomas, 14</b><br/> <b>Frewen v. Phillips, 21</b><br/> <br/> <b>Garritt v. Sharp, 47</b><br/> <br/> <b>Hackett v. Baiss, 93, 98, 100</b><br/> <b>Hale v. Oldroyd, 69</b><br/> <b>Harbridge v. Warwick, 20</b><br/> <b>Heath v. Bucknall, 98</b><br/> <b>22 Hen. 6, c. 15; Vin. Abr. "Nuisance," G. pl. 10, 1</b><br/> <b>Hughes v. Keeme, 1</b><br/> <b>Hutchinson v. Copestake, 4, 7, 49, 56</b><br/> <br/> <b>Inner Temple v. Temple Chambers Company, 123</b><br/> <b>Isenberg v. East India House Estate Company, 70</b><br/> <br/> <b>Jackson v. Duke of Newcastle, 69</b><br/> <br/> <b>Kelk v. Pearson, 30, 35, 70, 98, 121</b><br/> <b>Kidd v. Wagner, 8</b><br/> <b>Kiuo v. Rudkin, 103</b> </p> |
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| <p>Land Clauses Consolidation Act, 12<br/>         Leech v. Schweder, 98<br/>         Liggins v. Inge, 47, 85<br/>         Luttrell's Case, 46, 69</p> <p>Martin v. Goble, 46<br/>         Martin v. Hendon, 47<br/>         Merchant Taylors' Company v. Truscott, 9<br/>         Metropolitan Local Management Act, 92, 100<br/>         Metropolitan Local Management Act Amendment Act (25 &amp; 26 Vict., c. 109), 98<br/>         Metropolitan Building Acts, 1855 (18 &amp; 19 Vict., c. 122), 9<br/>         Moore v. Rawson, 83</p> <p>National Provincial Plate Glass Insurance Company v. Prudential Assurance Company, 64, 120<br/>         Norton v. The London and North-Western Railway Company, 22</p> <p>Parker v. Smith, 35<br/>         Penny, Charles, and the South-Eastern Railway Company, 12<br/>         Potts v. Smith, 80<br/>         Prescription Act, 59, 72, 79<br/>         Property Limitation Act, 15<br/>         Pyer v. Carter, 19</p> | <p>Renshaw v. Bean, 47, 49, 51, 56, 58 62, 63, 67, 69<br/>         Roberts v. Macord, 80</p> <p>Scott v. Pape, 77<br/>         Simper v. Foley, 81<br/>         Slater v. Maughan, 122<br/>         Smith v. Owen, 13<br/>         Smith v. Smith, 70, 75<br/>         Staight v. Burn, 29, 34, 37, 70<br/>         Stokoe v. Singers, 47, 85<br/>         Suffield v. Brown, 19<br/>         Sury v. Pigot, 2</p> <p>Tapling v. Jones, 37, 42, 65, 66, 67 69, 70, 71, 72, 98, 120<br/>         Theed v. Debenham, 88, 96, 120<br/>         Thomas v. Thomas, 47, 61<br/>         Turner v. Spooner, 12<br/>         Twinberrow v. Braid, 106<br/>         United Land Co. v. Great Eastern Company, 23</p> <p>Weatherby v. Ross, 47<br/>         Webb v. Bird, 8<br/>         Wheeldon v. Burrows, 19<br/>         White v. Bass, 19<br/>         Wilson v. Townend, 47<br/>         Wood v. Saunder, 48, 69</p> <p>Yard v. Ford, 4, 98<br/>         Yates v. Jack, 9, 94, 95</p> |
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# LIGHT AND AIR.

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## PART I.

### HISTORICAL.

THE present limitation of time to acquire a right to window-light is of modern date.

In former times the period required varied much at different epochs. In the earliest ages of the English law (I quote from Mr. Latham \*) the right to window-lights by occupancy was gained by prescription, by showing the enjoyment of the window-lights since the beginning of legal memory.

In a case in the reign of Henry the Sixth, it was said by Markham, J.: "If I have a house by prescription upon my soil, and another erects a new house upon his own soil next adjoining, so near to my house that it stops the light of my house, this is a nuisance to my house; for the light is of great comfort and profit to me."† And to the same effect were the expressions of Whitlocke, C. J.: "Like to the case where a man hath a house with windows in it, and another stops the light, then he may have an action upon the case; but true it is, that he shall not only count for the loss of the

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\* "Treatise on the Law of Window-lights."

† 22 Hen. 6, c. 15; Vin. Abr. "Nuisance," G. pl. 10.

air, but also he ought to prescribe that time out of mind light had entered by those windows." \*

Curiously, this "time out of mind"—time during which the memory of man had not run to the contrary—was ultimately settled to begin with the commencement of the reign of Richard the First. Of course, such a fixed date, as time rolled on, became intolerable; and we find a case cited in the law-books (*Bowry v. Pope*, 1 Leo, 168), in the thirtieth and thirty-first year of Queen Elizabeth, where, after the plaintiff had obtained a verdict for the obstruction of his ancient lights, the defendant moved in arrest of judgment that the windows, by the plaintiff's own showing, had been made in the reign of Queen Mary; and the Court affirmed this.

At this time much doubt seems to have existed in the Courts, for all the justices are stated to have agreed to the following:—"That if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and this house and the lights have continued by the space of thirty or forty years, yet the other may, upon his own land and soil, lawfully erect a house or other thing against the said lights and windows, and the other can have no action, for it was his folly to build his house so near to the other's land; and it was adjudged accordingly." †

It would appear that it was in the year 1623 that the fixed date was abolished, with its recurring necessity for a new date, to be from time to time agreed upon; and the time was fixed, by Act of Parliament, at twenty years. This Act, which is called the Statute of Limitations, does not allude to ancient lights at all; but, as it gave a limit of twenty years to the power of recovering by ejectment, it was considered sufficient

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\* *Sury v. Pigot*, Poph., 866; Tudor's "Leading Cases in Conveyancing," 127; *et vide* the declarations in the cases of *Bland v. Mosely*, cited 9 Rep. 58a, and *Hughes v. Keeme*, Yel. 215.

† S. C. nomine *Bury v. Pope*, Cro. Eliz. 118.

to confer a title to an easement belonging to the house—Chief Justice Wilmut pithily remarking, “If my possession of the house cannot be disturbed, shall I be disturbed in my lights?”

Yet at this period the law seems to have been uncertain, and to have had a good deal of the “John Roe” and “Richard Doe” (now somewhat exploded) about its methods; for twenty years did not give absolute right, but it was presumptive proof from which the jury *were directed* to find the existence of an agreement, the theory being that there was an agreement between the parties. Of course, this agreement was non-existent in reality; Lord Mansfield saying that the enjoyment of lights, with the defendant’s acquiescence, for twenty years is such decisive presumption of a right, by grant or otherwise, that, unless contradicted, or explained, the jury ought to believe it—his view being that it was impossible that length of time (not even time immemorial) can do more than create a presumptive bar.

A curious case is quoted in the law-books (*Darwin v. Upton*),\* where windows had been enjoyed for more than twenty years. The defence was that twenty-five years before, that is, five years before the commencement of the running of the twenty years, the owner of the adjoining land had given permission to put one window, and it was contended that this could be the only grant sustained; and the judge considered it a point that might be left to the jury to decide.

It would seem that a workshop built for the purpose of trade, and therefore removable as between landlord and tenant, did not give the right of light to its windows. The old law would appear to have been, at this time, that “twenty years’ uninterrupted possession was evidence from which a jury might presume a grant, and had to be taken with the qualification that the possession was with the acquiescence of

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\* 2 Wms. Saund. 175b.

him who was seized of an estate of inheritance; for a tenant for life or years had no power to grant any such right for a longer period than during the continuance of his particular estate. If a tenant for life or years permitted another to enjoy an easement on his estate for twenty years or upwards without interruption, and then the particular estate determined, such user would not affect him who had the inheritance in reversion or remainder; but when it vested in possession, he might dispute the right to the easement." \*

And there are other cases, as, for example, *Daniel v. North*,† in which it was so held. In this case, without the knowledge of the reversioner, a person had enjoyed the use of windows he had put for more than twenty years without any interruption from owner of the opposite premises, who, however, was only a tenant holding a lease. He did not acquire a legal right; and when the premises opposite were let to another tenant, who raised the wall, and so injured the light, he could not obtain any relief.

Curiously, it was held, where right of light had been enjoyed from glebe land for more than the prescribed time, yet, on the glebe land being conveyed to a defendant, who built thereon and obstructed the light to these windows, that no ancient light had been created; that at most the grant must be presumed to have been made by a tenant for life, and therefore it was invalid. I will not weary my reader with quoting many cases, or I might give three that support this decision.

Uncertain appears to have been the view taken by the judges at different epochs, sometimes favouring more the owner of the land, who wanted to acquire light from adjacent land, and at others favouring more the right of owners to build what they liked on their own land, irrespective of any consideration how far it might affect what buildings had

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\* *Yard v. Ford*, 2 Wms. Saund. 175e.

† 11 East. 372.

been erected by adjoining owners. As an example, it was contended that a dean and chapter could not grant an easement so as to injure their successors; but the Vice-Chancellor said, "The right which a man has in his own property is materially affected by the manner in which the owners of the adjoining property have dealt with their property. Therefore it does not follow, because the Dean and Chapter of Westminster cannot injure their successors, that the circumstance of houses having been built on the adjoining land may not of itself operate as a reason, at law, why the dean and chapter should not have the right to erect the building in question. The same reasoning, he implied, would apply to the Crown."

The law authority I have so freely quoted from says, "Still, in very many cases, the acquisition of a right to window-lights over land occupied by tenants for life or years was difficult, if not impossible." And the general rule of law which was, that in order that the enjoyment, which is the quasi possession of an easement, might confer a right to it by length of time, it must have been open, peaceable, and as of right. The civil law expressed the essential qualities of the user, by the clear and concise rule that it should be "*nec vi, nec clam, nec precaris*," this rule raised great difficulties in the way of owners acquiring the right.\*

Such, then, is a brief view of the history, and gives the position of this important matter in the year of grace 1832, in which year an Act of Parliament was passed, having for its object the shortening of the period of prescription, and to make possession a bar or title in itself, and thereby avoiding the old necessity of having recourse to the intervention of a jury to make it so.

We shall next have to consider the law as it now is.

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\* See Co. Litt. 113b.

## PART II.

## PRESENT POSITION OF THE LIGHT AND AIR QUESTION.

THE new Act of 2 & 3 Will. 4, c. 71, we have seen, did away entirely with the idea that the right rested on any supposed presumption of grant or fiction of a licence. The words of the section which relate to it are :—

*Sect. 3.* “When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

*Sect. 4.* “Each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been, or shall be brought into question, and no act or other matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.”

This, then, is the foundation of right, and the first step the surveyor will take, when consulted, is to see if the ancient light comes within the provision of this statute.

It may be well, before proceeding further, to have a clear

understanding of "light and air," and for this purpose it is necessary to consult the legal writers, and I therefore give Mr. Latham's definition :—

"Light and air are, in the English as in the Roman law, *res communes*, things in which no permanent property can be acquired. Every one may use and enjoy them whenever he has the opportunity so to do; no one can acquire a future property in them. The right, then, cannot consist in a title to the possession of the light and air which in all future time will pass over a given space. But it must consist in some obligation, in some manner imposed on the owner of that space, to refrain from so using it as to interfere with the light and air which will pass over it to the tenement to which the light is annexed. Of this obligation we shall be able to form a clearer notion by a short examination of the respective rights of the owners of two adjoining pieces of land, previous to the acquisition of any right by the one, and the imposition of any obligation on the other.

"Every owner of land, with a few unimportant exceptions, is owner also of all the space superincumbent upon that land. '*Cujus est solum, ejus est usque ad cœlum*' is a maxim of the English law. . . . And an interference with the space superincumbent on a man's land is an injury for which the law gives a remedy. Every man may deal with his land and the space above it in such a manner as he thinks fit, so that he do no injury to his neighbour or to the public. He may erect on his land a house with as many windows as he pleases; and he may build this house on the very extremity of his land, close to the land of his neighbour. By so doing he confers no new right, and inflicts no injury on his neighbour. It is true that the windows of this building may command a view of his neighbour's gardens or pleasure-grounds, or even of the interior of his house—may so invade his privacy, and consequently lessen the value of his property. But this is not considered by the law as a wrong for which any remedy is given."



Lord Coke lays down "that a thing incorporeal cannot be appurtenant or appendant to another thing incorporeal," "so that an easement can only be claimed as accessory to a corporeal hereditament."

Some writers set forth that there can be no claim for "air," and therefore limit their observations entirely to light; but, as Mr. Locock Webb pointed out, although it is rare now that a case is established for the interference of the Court upon the ground of stoppage of air, irrespective of the obstruction of light, yet in his own experience such cases had arisen. In his paper before the Institute of British Architects, he said: "For example, in *Kidd v. Wagner*, heard before the Master of the Rolls, where the complaint was that the defendant intended to build a new church in Brighton, so close and of such a height as to stop the free passage of light and air to the plaintiff's malt-house, which required a free current of air, a perpetual injunction was obtained; and in *Dickey v. Pfeil*, heard in the last vacation before Mr. Justice Fry, where the complaint was mainly grounded on the stoppage of the free current of air to the plaintiff's houses, situated in the crowded neighbourhood of Drury Lane, an interim injunction was obtained; but such instances are exceptional, and in the following observations no distinction is intended to be drawn between the obstruction of light and air, although mention is made of the obstruction of light only."

The right to access of air stands on a different footing to that of access of light, and such right over the general unlimited surface of land cannot be acquired by mere enjoyment.—*Bryant v. Lefever*, 4 C. P. D. 172. For example, a right to the access of air to a chimney of the plaintiff's house, as decided in the last quoted case, or to the plaintiff's wind-mill, *Webb v. Bird*, 13 C. B., N. S. 841; 31 L. J. C. P. 335, cannot be acquired under 2 & 3 Will. 4, c. 71, § 2.

It will therefore be apparent that the surveyor must not lose sight of the question of "air;" and, in one's experience, the lawyers always in their actions set out this loss.

The Metropolitan Building Act, 1855 (18 & 19 Vict., c. 122) sect. 83 which gives a right to the building owner "to raise any party structure permitted by that Act to be raised," . . . "upon condition of making good all damage occasioned thereby to the adjoining premises," does not enable a person to build a party wall so as to darken ancient lights.—*Crofts v. Haldane*, L. R., 2 Q. B., 194. And the custom of London respecting the heightening of walls is controlled by the (prescription) Act 2 & 3 Will. 4, c. 71. *Merchant Taylors' Co. v. Truscott*, 11 Ex. 855; 25 L. J., Ex. 173; *Yates v. Jack*, L. R. 1, Ch. 295.

Having given the words of the Act relating to this subject, and the legal definitions, I now proceed to deal first with those interruptions and interferences for which the aggrieved party has no remedy, and next, those for which he has.

#### TABLE I.

*Injuries sustained by servient owner, for which the law provides no compensation or redress.*

1. Diminution of the value of a house caused by its windows being overlooked.
2. Destruction of its privacy.
3. Destruction of its view or prospect.
4. View of goods in shop windows.

*As to items 1 and 2.* At first sight it does appear as if some compensation or relief should be granted; for, if there is one thing much esteemed by Englishmen, it is privacy, and the injury unquestionably, in certain cases, may be very great. I have in my mind three cases which have happened in my practice; one, the extension of a soldiers' hospital, the whole of the windows of which building overlooked some villas on a portion of the estate of which I am the receiver, having been appointed by the Court. This building, of four lofty stories in height, with the windows in the summer time constantly open, and soldiers sitting at them, was so objectionable that the tenants of the villas (whose privacy was

destroyed) left, and I was compelled to take a lower class of tenant at reduced rents. In the second case, where a tall factory building was erected, which overlooked a croquet lawn and the secluded portion of the grounds; and the third case, a range of model houses, the flank windows of which, on every story, commanded a view into the adjacent owner's grounds and of his front door.

As showing that such injury is happening frequently, I may mention that I was only the other day at Clapham, where the privacy of beautiful secluded grounds had just been destroyed by a speculative builder, who had purchased the land in the rear, bisecting and intersecting it in all directions with streets, and building houses the back windows of which commanded the whole of the grounds.

That such injury is not confined to England alone is shown by the following extract from a well-written series of articles appearing in the *Builder*, and headed "A Run through Spain." The extract is from the issue of the 4th of January, 1879.

"On our road to another new mansion we passed the Puerta de Alcalá, which is the only really handsome triumphal arch in Madrid. It once formed part of the walls, but is now surrounded with gardens. In height it measures 72 feet, and possesses five arches. The Calle de Alcalá, which leads up to this gate, is also one of the principal streets in Madrid. Some time ago there was a small amount of ground vacant at the end of the street, and facing the Puerta de Alcalá. The Marquis of Portugalette was anxious to build a mansion here, but would not buy the whole plot of ground, though urged to do so by the Town Council, who were anxious to see this important site devoted to a building worthy of the position. The marquis was, however, obdurate. He contented himself with the larger portion of the ground, and there built his mansion. Soon, however, the remaining plot of land was sold, and this fell into the hands of some speculative builders. They at once ran up a house

of immense height, to be let out in flats, and held out as a special inducement that the back windows of each of these flats overlooked the garden of the Marquis of Portugalette's mansion, commanded an excellent view through his windows, and that, in a word, the *bourgeois* occupants of these apartments might, during their leisure moments, find some diversion in watching the movements of the aristocracy besporting themselves in the mansion next door. As there is a certain element of snobbism even in Spain, these arguments might have proved effective but for the energetic action of the marquis. Infuriated at finding himself at the mercy of his neighbour's curiosity, he has caused an enormous wall to be built at the edge of his garden. This had already reached the height of the third story when we passed in front of the mansion. The wall, in red brick, is ugly as the most malicious might desire, and it threatens not only to block the view that the inhabitants of the apartments were to enjoy, but it will most evidently deprive them of the light of day, which is so essential to their well-being. This surprising struggle between the proprietors of the two houses at the corner of the Calle de Alcalá is one of the oddities of Madrid, and a general source of amusement. On the whole, the public feeling runs against the marquis. It is argued that he could very well have bought the entire plot of ground, and that this would have been much better for the general appearance of this important public place, than allowing a portion of the land to be covered by a somewhat ordinary house, divided into flats."

It therefore behoves the architect, in advising purchases of estates, to pay much attention to surrounding land and its powers of development, as, should any of the interferences herein alluded to occur, his client will have no remedy, by injunction or by compensation, neither for the loss of the privacy, nor even if he can show that the rental value is most seriously depreciated.

That my reader may be certain this view is correct, I

quote from Mr. Homersham Cox, M.A., who, in his legal work on this subject, gives Vice-Chancellor Kindersley's words in *Turner v. Spooner* (30 L. J., Ch. 801): "No doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard; but neither this Court nor a court of law will interfere on the mere ground of invasion of privacy; and a party has a right to open new windows, although he is thereby enabled to overlook his neighbour's premises, and so interfere, perhaps, with his comfort." A house is not "injuriously affected," within the meaning of the sixty-eighth section of the Lands Clauses Consolidation Act, by the annoyance of people standing on a railway embankment and overlooking the house (*Re Charles Penny and the South-Eastern Railway Company*, 7 E. & B. 666; 26 L. J., Q. B. 225).

It will therefore be seen that, although other injuries caused by railways may have remedies, a railway can with impunity destroy the entire privacy of one's residence, without paying one farthing compensation.

*As to item 3.* The law has never acknowledged that the dominant owner has a right of prospect. It was decided by Chief Justice Wray, "that for prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great recommendation of a house if it has a long and large prospect."

Justice Twisden said, "Why may I not build a wall that another man may not look into my yard? Prospects may be stopped, so you do not darken the light."

Lord Hardwicke's decision, too, is important: "You come in a very special and particular case on a particular right to a prospect. I know no general rule of common law which warrants that, or says that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town."

And in another case the same judge remarked, "It is true

that the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason for hindering a man from building on his own ground."

Lastly, may be cited the words of Lord Cottenham: "It is not, as is said in one case, because the value of the property may be lessened; and it is not, as is said in another, because a pleasant prospect may be shut out, that the Court is to interfere; it must be an injury very different in its nature and its origin to justify such an interference."

It may be well to give the difference between "light" and "prospect." "Light" means light of the sky; "prospect" means view of things on the earth.

*As to item 4.* The injury to a shopkeeper if his goods in a shop window cannot be seen is undoubted, and I suppose no one would doubt that if his sign-board were concealed by a projecting building, so that it could only be seen standing directly in front, there would be a palpable injury to the trader. If such were not the case, would pawnbrokers be so anxious to place their well-known sign high aloft and far projecting, so that it may be seen at great distances? would chemists and doctors favour so strongly the red light? would corner premises have such exceptional value? would publicans set such store on their supposed acquired right of putting their swinging sign-post in the roadway? would tradespeople be so loth to part with pieces of land in front of their shops, if they did not consider it an advantage to expose their goods? Clearly the answer is, the rights are valuable, and that undoubtedly the trader Mr. Smith, in the case *Smith v. Owen*,\* where his next-door neighbour made such alteration in his premises that it prevented Mr. Smith's shop from being seen as far off as before, consequently suffered material damage. The law, however, gave no relief, Vice-Chancellor Wood holding that there was no ground for relief in Chancery. Again, where a greater injury has been inflicted

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\* 35 L. J., Ch. 317.

by the Imperial Gas Company, who erected a gasometer, which concealed the plaintiff's board, on which his name and trade were painted, Vice-Chancellor Kindersley and Lord Chelmsford (on appeal) held that a bill in Chancery could not be maintained on that account.

The decisions, therefore, confirm that the law gives no relief for any of the items set out in Table I. We now come to Table II, which shows how the right to light and air is acquired.

TABLE II.

*How right to light and air acquired.*

1. By continuous use for twenty years.
2. By express grant.
3. By implied grant.
4. By a dominant and servient ownership, distinct from each other.

The more usual way of the acquisition of light is by its continuous use and enjoyment for twenty years, and the proof of the length of time is sometimes a matter of difficulty to the dominant owner.

The next eccentricity is this, that although the right cannot be acquired under the twenty years, yet, as it must be interrupted for the whole period of twelve months, it follows—and the law confirms it—that nineteen years and a small portion of another year prevent the possibility of contesting the right. Although at first sight this may appear strange, yet on reflection the reader will see there was absolutely no other way of deciding the law. The law being that the interruption to the twenty years must continue twelve months, clearly, therefore, a man who commenced to stop a light after the nineteen years had elapsed, could not before the expiration of the twenty years have interrupted that light for a period of twelve months, and therefore, as no twelve months' interruption could occur, the Courts held that the light was acquired.—*Flight v. Thomas*, 11 A. & E., 688; 8 Cl. & F., 231.

Thus, it will appear that although by law twenty years is necessary for the acquisition of the right, yet, should any one take steps to contest it by erecting obstructions, nineteen years and one day will defeat his attempt.\*

In alluding to the length of time which creates this special easement, my readers will see that in the table I have placed twenty years, and some explanation may be considered necessary. In the year 1874 an Act was passed, called "The Property Limitations Act," which has just come into operation, and it was considered as this Act limited the right of action to recover land to twelve years, it would necessarily also limit the right of action for light. The many legal authorities I have consulted say, however, this Act does not affect the "light and air" question; so, until some bold judge, like Chief Justice Wilmut (see p. 3 of this book), shall decide otherwise, it must be taken at twenty years. It does not, however, seem consistent that the right to light should differ from the right to acquire land.

Next, it is necessary to determine how to compute the running of the time to constitute the necessary number of years to create the ancient light.

The law says the time shall run to be computed next before action brought, so that in computing the time it is only necessary to add the number of years from the date of action. Unquestionably this simplifies the computation of time necessary to create the ancient light.

Another curious point in determining the running of time is set forth in Latham's work, which would appear to induce an owner, directly the proper time had expired, to subject himself to what the lawyers call a friendly action, to settle for ever his right. His words are, "It has also been held, upon the words of the third and fourth sections of the Act, the twenty

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\* I may mention that this case is a very celebrated one, in which one of the parties was a client of mine, and which was fought not merely in the Courts, but was carried up to the House of Lords.



years' enjoyment before *any* suit or action in which the plaintiff's claim to light and air is brought in question is sufficient to confer the statutory right, and not of necessity twenty years' enjoyment before the suit or action then in progress." I think the intention was to give enjoyment under the Act the same effect as the evidence which would sustain a prescriptive claim before the Act, except that the terminus of the statutory enjoyment must be a suit or action, which discloses the nature of the claim and gives an opportunity of litigating it. I need hardly refer to authorities to show that the evidence to sustain a prescriptive claim before the Act need not have come down to the commencement of the suit, nor to any defined period; Justice Willes remarking, "Can it reasonably be contended that the right established in the first action evanesces with the termination of the proceedings in which it is established, and that in every subsequent action the contest may be renewed? There is no estoppel, no plea of *res judicata* as to the right upon a plea or, subsequent pleading under Lord Tenterden's Act, unless enjoyment before a former suit or action may be pleaded, as in the present case."—*Cooper v. Hubbuck*, 12 C. B., N. S., 456.

Where the right is obtained by express grant, it is, of course only necessary to produce the document conferring the right. This document should be under seal; but it does not appear to be absolutely necessary, as an agreement in writing has been held by the Master of the Rolls sufficient *express grant*, although in the document no mention was made of the grant of right to light, but attached to the agreement were plans and sections showing the new lights. The ground for this decision appears perfectly sound and good, and is based on Lord Eldon's decision in an earlier case, "that this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous impression of title; and the circumstance of looking on is, in many cases, as strong as using words of encouragement."

We next have to consider the last item in Table II., and

here the difficulties of proving an *implied grant* are very considerable. I cannot cite, I think, a better case in proof thereof than the case where a plaintiff and defendant occupied adjoining tenements, which had formerly belonged to one owner. The former owner had conveyed one of these tenements to a person whom we will represent by the letter A., who immediately enlarged and altered the windows. The owner was often present while A. was making such alterations and enlarging the windows. Subsequently the owner conveyed the adjoining tenement to B. Now B., knowing full well that A.'s tenement had not had light for twenty years, assumed he had perfect right to erect a high wall at his boundary, as A. had no ancient lights. At the trial it was contended that, though in ordinary course B. would be perfectly justified in building such wall, the acts of the owner of both the tenements antecedent to the conveyance to B. estopped him.

I think the decision seemed equitable and just. A. laid out his money, giving the owner of the two tenements full information of the general nature of them, and the owner of both tenements was often present while the works were in progress. After the alterations had been completed, the owner of both tenements conveyed the one in which the alterations had taken place to A. Having done so, a short time afterwards he conveyed the adjoining tenement to B. B. knowing there were no ancient lights, and considering he could ignore any acts adverse to him which had been performed by the owner of both tenements before he became the freeholder, considered he could easily defeat A., who objected to his wall and injury of light.

As in legal decisions much turns upon the exact words, I give Justice Patteson's language in delivering the judgment of the Court: "There may appear to be some hardship in holding that the owner of a close, who has stood by, without notice or remonstrance, while his neighbour has incurred great expense in building upon his own adjoining land, shall

be at liberty, by subsequent erections, to darken the windows and so destroy the comfort of such buildings. Yet there can be no doubt of his right to do so at any time before the expiration of twenty years from their erection, and this with good reason; for it is far more just and convenient that the party who seeks to add to the enjoyment of his own land, by anything in the nature of an easement upon his neighbour's land, should first secure the right to it, by some unambiguous and well-understood grant of it from the owner of that land, than that such right should be acquired gradually as it were, and almost without the cognizance of the grantor. If a party, who has neglected to secure to himself rights so important by previous express licence or covenant, relies for his title to them upon anything short of an acquaintance for twenty years, we think the onus lies upon him of producing such evidence as leads clearly and conclusively to the inference of a licence or a covenant. It is difficult, perhaps impossible, to define the necessary amount of such evidence; but we are of opinion that the amount in the present case is clearly insufficient."

Probably, in dealing with *implied grants*, the real difficulty rests with the motives of the parties.

The difficulty must indeed be great to discover whether the person erecting the obstructing building has the requisite authority, or whether the adjacent owner by his silence does not mean to give assent, but that his intention is, as it is called, "to lay by," and so by this method, at a future time, to obtain extortionate compensation. Of course, it might proceed from want of knowledge of the law, and the adjacent owner therefore thinking he had no legal power to stop the building owner.

All these are added difficulties to which the Court must address itself in its endeavour to construe what is and what is not an implied grant.

To show how sometimes one may imagine he has a case and yet not have, I quote the following case, reported in the

*Times* of November 21, 1878 :—" *Wheeldon v. Burrows*.\*—This case raised a question which has been a disputed point of law for hundreds of years, and which is often of importance—namely, where two persons simultaneously buy from the same owner, adjoining pieces of land with houses upon either of them, what are their rights to light and air as against each other? In January, 1876, Samuel Tetley sold land at Derby to Wheeldon, and adjoining land with a factory and other buildings on it to Burrows, and Burrows contended that the windows in his building, whether ancient lights or not, were apparent continuous easements necessary to the convenient enjoyment of his buildings, and therefore, when Tetley sold the adjoining land to Wheeldon, he expressly or impliedly reserved these lights, and Wheeldon could not now block them up. Wheeldon put up a boarding against Burrows' windows, in order to test his rights; this boarding Burrows threw down, and so the question came before the Court.

"Mr. Horton Smith, Q.C., and Mr. Romer for Wheeldon; Sir H. Jackson, Q.C., and Mr. Cobb for Burrows.

"Vice-Chancellor Bacon reserved his judgment, and this morning delivered it to the following effect :—The plaintiff contends that as the defendant's lights are not ancient lights, he holds his land subject to no easement; while the defendant contends that the right to lights over the plaintiff's land was implicitly reserved to him as much as if they had been expressly granted in the conveyances. The judgment in *White v. Bass*, reported 7 Hurlstone and Norman, 722, is clear on this point—that in a conveyance such as this there is no engagement not to build on the land, nor any limitation upon the right to use the land—i.e. to use it in a lawful way, as Baron Martin said. So in *Suffield v. Brown*, the bowsprit case, reported 4 De Jex. Jones, and Smith, 185, it was in a

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\* 12 Ch. D. 31, C. A., where the Court of Appeal confirmed the decision of the Vice-Chancellor.

similar case held that a grantor should not derogate from the grant which he had made. *Pyer v. Carter*, quoted on the other side from 1 Hurlstone and Norman's Reports, has been doubted, not only by Lord Chancellor Westbury, but also by Lord Chelmsford, another Lord Chancellor, in whom I may, in passing, say that the country has recently lost a most upright, able, and experienced judge, and I have lost a dear friend of more than fifty years' standing. In cases where an easement has been held to pass by implication, such implication has been gathered from the necessity of the case. No such necessity seems to arise in this case. The position of the defendant's windows is not such that there is any necessity that they should overlook the plaintiff's ground. The plaintiff is entitled to an injunction against the trespass, and an enquiry as to damages occasioned by such trespass."

It will be here seen that where a man buys a house with windows in it, there is no implied grant of window-light.

Now we have to deal with *item 4*, and it probably presents one of those peculiarities which the non-legal mind can hardly grasp; and yet the law is most distinct upon the subject.

No rights can arise to a dominant owner antecedent to the severance of the dominant owner's and servient owner's premises. Where the two premises are in the occupation of the same person, any number of years' enjoyment will not confer a right.

This seems *common sense*, because the right to light is, as I before explained, a right to an easement, and while premises are in one occupation an easement cannot arise.

That such is the law is shown by the well-known case, *Harbridge v. Warwick*.\* The plaintiff had occupied for very many years his freehold house, and occupied during the same period an adjacent garden. The plaintiff gave up the tenancy of the adjacent garden, and its owner built a wall which obstructed plaintiff's windows. Plaintiff contended that he

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\* 3 Exch. 552.

had had for over sixty years the right to light from such adjacent garden, but the Court decided (and this was not appealed from, and therefore may be considered the law, as so many other cases confirm it) that the unity of possession, which means plaintiff holding his house and the adjacent garden in his possession, prevented time running to create the ancient light; therefore the time could only run from the period the plaintiff surrendered the adjacent garden.

Next, an important element of difficulty as to this *item* 4, where the union of ownership occurs of dominant and servient tenements. Guided by the foregoing principles, it would be imagined that the commencement of the period to create the ancient light would begin when such ownership ceases. But in law this is not the case. Such union of ownership merely suspends the running of the time so long as it continues; and Vice-Chancellor Wood held that in such a case the easement was suspended during this union of ownership, but revived upon its severance.

While this shows that the right to light and air by its continuous use and enjoyment for twenty years may, unwittingly, be affected by purchases of the adjacent property by oneself or others, it is consoling to reflect that, although you may hold your property on lease from the same ground landlord, still your adjacent owner cannot use that fact to your prejudice. The celebrated case in this matter is *Frewen v. Phillips* (in the Exchequer Chamber, upon error from the Common Pleas, 11 C. B., N. S. 449; 30 L. J., C. P. 356; 7 Jur., N. S. 1247). The plaintiff and defendant held the leases of two adjoining houses, both demised by the Duke of Portland in 1788. In 1857 the defendant built a conservatory, obstructing the plaintiff's windows. It was held that the plaintiff might maintain his action against the defendant for so doing.

One exception it may be desirable to mention, and that is, that railway companies appear not to have the power to stop adjoining owners from acquiring right of light, provided that their so acquiring such right shall not in any

way interfere with the companies working their railway. The most celebrated case is the case of *Norton v. The London and North-Western Railway Company*, and which is reported in L. J., N. S., vol. 47, Chancery and Bankruptcy, in which it was decided that the company had no right to erect screens to prevent the houses of the adjoining land acquiring right of light. I give the head note and the decision :—

MALINS, V.C., 1878, July 8, 9, 10, 15.

*Norton v. The London and North Western Railway Company.*

Railway Company—Adjoining Landowner—Easement—Right to interfere with Access of Light.

Where land has been taken by a railway company for the purposes of their railway, the owner of the adjoining land is as fully master of it for all purposes as he was before, so that he does not interfere with the proper working of the railway.

The plaintiff, the owner of the land adjoining a railway, built on his own land a house having windows overlooking the railway. The defendant company erected a large hoarding close in front of these windows, to prevent the plaintiff from acquiring an absolute right to the access of light across the railway. This hoarding was afterwards blown down.

*Held*—that as these windows in no way interfered with the working of the railway, the company had no right to erect the hoarding, and injunction granted to restrain them from re-erecting it.

I now give Vice-Chancellor Malins's decision *in extenso*, as it is so well and clearly expressed :—

“The points raised by this railway company are of the highest possible importance to the public; and if they can be sustained, would, in my opinion, put the public in a most unfortunate position with regard to the exercise of rights of ownership over lands adjoining railways.

“Now what are the rights which a railway company acquire in the land which they take for the purposes of their railway? It is not disputed that they acquire the absolute fee simple. I had occasion to go into this question in the case of *The United Land Company v. The Great Eastern Railway Company* (*ubi supra*). I should refer to that case with much more diffidence than I do if it had not been completely confirmed by the Court of Appeal. In that case land had been compulsorily taken by a railway company. The land on one side of the railway was then mud land, and it was very improbable that it could ever be applicable for building purposes. Afterwards the land became applicable for building purposes, and the plaintiff company proposed to erect several houses on it. In order to get to these houses it would be necessary to cross the railway by certain level crossings. The company thereupon raised the contention that these crossings could only be used for the purposes to which the land was applied when the right to cross was originally given. In giving judgment I said, ‘When one part of an estate is severed from another by a railway it is always a condition that sufficient communication shall be made, either over the railway by a bridge, under the railway by an arch, or across it by a level crossing. But I apprehend that whatever be the mode of communication, the object is that the right of the landowner shall be in no way prejudiced, except so far as is required for the actual construction of the railway. He is to have as much enjoyment and as free use of his land after the railway is constructed as he had before, as far as the exercise of those rights does not interfere with the rights of the railway company and the rights of the public in running over the lands upon the railway.’ Surely among those rights must be the right of erecting a building with windows in it looking over the railway. In the judgment of Lord Justice James, in the Court of Appeal, there is this important passage—entirely in accordance with what I had said—‘The object was, of



course, that the severance of the land by the railroad should leave the owner of the land as fully master of the land for all purposes as he was before, so that he did not interfere with the working of the line.' Would any one venture to say that these seven windows looking over the railway in any way interfered with the working of the line? 'The object is simply to give to the railway company an uninterrupted right of way for themselves across the land, but not to take away from the owner anything that is not absolutely necessary for the purpose of the railway.'

"Then there is the earlier case of *Bosstock v. The North Staffordshire Railway Company* (*ubi supra*). That was a case I well remember, having been counsel during the whole of the litigation. The railway company had acquired a reservoir of considerable extent, and they thought they could turn it to account by advertising regattas upon it. The plaintiff, a lady with a beautiful house and grounds close by, complained that the result of this was to collect disorderly crowds of people, who broke down her fences, &c., and she accordingly commenced a suit to restrain the company from using the reservoir for the purpose of a regatta. According to the then practice of the Court an injunction was granted, with liberty to the plaintiff to bring an action. She brought her action in the Court of Queen's Bench, the result being that three judges against one came to the conclusion that the railway company, although they were owners in fee simple, had only a qualified ownership, and were only entitled to use the reservoir for the purposes for which they had acquired it (1). Sir John Stuart, in ultimately disposing of the case, and granting a perpetual injunction, says, 'It is the settled doctrine of this Court that the rights of ownership in fee, conferred on public companies, must be restricted and qualified by the terms of the legislative contract' (2).

"The defendant company set up this sort of defence: 'We may have to build a station here. We have therefore a right

to block up the windows of the plaintiff's house; because, if we allow him to acquire an adverse right, we may be prevented from building our station.' With regard to this particular spot, I am of opinion that this defence was a mere afterthought. The company knew perfectly well that the place was not adapted for a station.

"As a further illustration of the limited powers of railway companies, I may mention the case of *The Attorney-General v. The Great Northern Railway Company* (*ubi supra*), which shews that a railway company cannot embark in an extra-neous trade.

"Therefore, on these grounds, I am clearly of opinion that the plaintiff is entitled to a perpetual injunction to prevent the future blocking up of his windows; and he is also entitled to damages for the injury he has sustained during the period they were blocked up."

(His Lordship after elaborately reviewing the evidence as to the ownership of the strip of land between the quickset hedge and the southern wall of the plaintiff's house, and coming to the conclusion that it was not the property of the railway company, said): "The posts and rails, originally placed on the northern side of the quickset hedge, have been removed certainly more than twenty years before this dispute arose. It is, therefore, not necessary for me to consider the cases cited by the defendants, as to whether the non-user of land by a railway company for ten years is an abandonment of it, so as to vest it in the owner of the adjoining land.

"There must be an enquiry as to the damages suffered by the plaintiff by reason of the defendant company having obstructed the access of light and air to his windows, and also as to the damages suffered by the smoke from the signal cabin."

*Solicitors*—Clarke, Woodcock and Ryland, agents for Chesshire, Birmingham, for plaintiff; R. F. Roberts for defendants.

Let us continue our tabulated form, because of its great value, although some Tables may comprise so few items.

TABLE III.

*What does not interfere with the right.*

1. Non-completion of the house or building.
2. Non-occupation.
3. Enjoyment of easement suspended.

I think this so important, that I may well devote a separate Table to its consideration. It has been so frequently stated that the continuous use for the fixed period of twenty years gives the right, and that to prove the enjoyment for that fixed period is the essence of the case for the plaintiff, that it may surprise my readers to know that *occupation* and *enjoyment* need not extend to the whole of the period required to create such *ancient light*, and that the period of prescription begins as soon as the windows are put in the dominant house, capable of being open and shut, and of admitting light.

It is not necessary that the house should be occupied, *Courtauld v. Legh*, L. B., 4 Ex. 126.

In 1869 it was decided that, though the fittings, papering, &c., were not completed for five years after the time commenced to run necessary to create the statutory right to ancient lights, this did not interfere with the effluxion of time necessary for the acquirement of such light. Further, that, notwithstanding the necessity of the enjoyment for the fixed period, yet, although the house was really uninhabitable, and was not as a matter of fact occupied for some years after the commencement of the running of the time to create the ancient light, the Court of Exchequer held that the right had accrued from virtually the completion of the carcase of the building; and it may interest my readers to know that as to the enjoyment (which, as no tenant had enjoyed, appeared a stumbling-block to this portion of the case), it was held that it was not necessarily by occupation, but might be by ownership.

With regard to *item* 3, in the Table at the head of this

Chapter. Since my last edition was published, an important decision has been given, showing that when a building is pulled down, and clearly the actual enjoyment of an easement of light has ceased, this does not operate as a loss of the easement, and as this is an important case I quote it. It is the ruling case, and not merely is so now, but most likely will continue to be so for years to come, having been carried to the Court of Appeal. I think it so important that I give the head-note and the summing-up of the three judges who constituted the Court of Appeal. The case is *The Ecclesiastical Commissioners for England v. Kino*. I recommend my readers carefully to read the summing-up. I believe the principles of our laws and their application is more fully acquired by so doing by laymen, than by any other method:—

HALL, V.C., 1880, Feb. 26th.

*Court of Appeal*—JAMES, L. J., BRETT, L. J., COTTON, L. J.  
1880, March 25th.

*The Ecclesiastical Commissioners for England v. Kino.*

Ancient Lights—Enjoyment of the Easement suspended—Easement itself not suspended.

Where a building with ancient lights has been pulled down, and the actual enjoyment of that easement (though not the easement itself) has been in consequence suspended, the owner of the building can apply to the court to restrain an erection which would interfere with the easement, when the court is satisfied that he is about to restore the building with its ancient lights. Accordingly when under their Act and Order in Council, a church had been vested in the Ecclesiastical Commissioners upon trust, to pull it down and sell the materials and site, and the church had been taken down, the Commissioners were held entitled to an injunction, restraining the defendant from erecting a building which

would necessarily interfere with the access of light to windows to be erected in the same position as those of the church which had been pulled down, and the fact that there were no windows then existing, did not at all interfere with their right to such injunction, there being no intention of abandonment of the right to light.

The Ecclesiastical Commissioners, as owners in fee simple of a church which they have under an order pulled down, are not in a different position from any other owner, and can give to a purchaser from them exactly the same rights which he would have had if he had bought the building as it stood.

Semble, there is no legal impossibility in a grant or a covenant by a rector to or with the churchwardens on behalf of the parish, if made with the proper consents that the church shall have a perpetual right to access of air and light to its windows over the glebe.

In cases of obstruction to light, the rule of the angle of forty-five degrees is only to be used as a test in the absence of any other mode of arriving at a conclusion, it is no rule or presumption of law. The angle of forty-five degrees is not taken from the windows, but from the top of one house to the level of the street on the other side.

An undertaking given by a defendant to pull down if his works should interfere with the plaintiff's access of light, should always be rigorously enforced.

JAMES, L. J.—“In this case we have to consider whether or no we should grant an interlocutory injunction. Upon the point upon which the Vice-Chancellor disposed of the application to him, I am not able to agree with him. It appears to me that there is nothing whatever to prevent the owner of a building which has been taken down, and has during that time had its right of light though the actual enjoyment of the light has been suspended, from applying to the court for an injunction to restrain an erection which would interfere with that easement, which is not at all destroyed or suspended, although the practical enjoyment of

it is suspended, where the court is satisfied that he is about to restore the building, and to restore it with its ancient lights. That was so decided by Lord Justice Giffard in *Straight v. Burn*, which, unfortunately, was not brought to the attention of the Vice-Chancellor, and I cannot see any distinction between that case and this. There the house was taken down and a wall was left standing with holes in it. Here the church was taken down and the fact that no wall was left standing with holes in it does not, I think, make any substantial difference, because there is no doubt that the object was that the property, which is in the City of London, should be sold for the purpose of being built on; and there is very little doubt that, as far as possible, the purchaser from the Ecclesiastical Commissioners would take and preserve the valuable rights of light. On that point I cannot agree with the Vice-Chancellor.

“Then it also appears to me there is nothing in the objection that the Commissioners, because they were ordered to take down the church to sell the site, are in a different position from any other owners. They were the owners in fee simple of the church, and the very object was that they were to convey all the rights incident to the church for the purpose of making the most money they could for the ecclesiastical purposes for which the purchase-money of the site was to be applied. It is clear that they were to have and to give to a purchaser exactly the same rights the purchaser would have had if he had bought the building as as it stood.

“Then, the right being the same in that respect, we ought to act in the same way unless satisfied that there is no injury to the light. Now upon that, for the purposes of an interlocutory application, the balance of the evidence (if there is an evidence really on the parts of the defendants) is very strongly in favour of the plaintiffs that there will be that substantial interference with the access of light which is the sole ground on which the Court proceeds, and which is the

sole test in the matter for the Court. That rule of the forty-five degrees is a matter of very slight importance. It may be an element in the case, but it is a very small one indeed. It is only to be used as a sort of test in the absence of any other mode of arriving at a conclusion, but it is no rule of law, no rule of evidence, no presumption of law and no presumption of evidence except of the very slightest kind. I venture to say that what I said in those cases of *Kelk v. Pearson*, and *The City of London Brewery Company v. Tennant*, although it is only in truth repeating, with very little variation of language, that which was said by Chief Justice Best in *Back v. Stacey*, which has always been considered as the direction which a Judge ought to give to a jury, and which is the direction we ought to give to ourselves expressed as accurately as language can express the rule. Then, as I have said upon the balance of evidence before us, it appears to me that there will be substantially a diminution of the access of light to those windows, if the windows should be restored, as I believe they will be, so as substantially to diminish the value of the property. Then the only other question to be considered is, whether the point of law about the title which Mr. Pearson raised is such as to induce us to hold our hands.

“His contention, in substance, was that, having regard to the fact that the one tenement was a church and the other glebe land, it was utterly impossible in a case of that unity of possession, that there ever could have been anything like a valid grant of the right of light, and therefore there is such an obvious defect of title in the plaintiffs that we ought to hold our hands.

“I am not at present, whatever may be the result of a further hearing—speaking for myself alone—very much impressed by that contention. I am not at all impressed with the notion that it was utterly impossible that there could have been a valid (either legal or equitable) creation of the right of light to the windows of the church of such a kind as

would have prevented the owner of the glebe from obstructing those windows. I think myself it would require a good deal to satisfy me that such a right was incapable of being granted, and we are to suppose that there is that doubt in the face of the fact that this church is a very old church, and that the former church probably had windows much in the same position as the windows were in the church lately pulled down, which was rebuilt by Sir Christopher Wren, and in the face of the fact that from that time to the present, the windows had existed.

"It appears to me that there is sufficient *prima facie* evidence, not only of the *de facto* enjoyment of the light, but of the lawful and rightful enjoyment as of right as between the church and the owner of the glebe, and that the doubt is not such as to induce us to hold our hands from doing that which we ought to do in an ordinary case, namely, stay the erection of these buildings till the hearing or further order."

BRETT, L. J.—"Several very interesting points have been raised in this case, and the objections to the plaintiff's rights to an injunction seem to me to class themselves thus:—First. Assuming that the proposed buildings would substantially obstruct the light into apertures similar to those existing in the old church lately pulled down, it is objected that the plaintiffs are not the people who in this court, and at this stage should object; and secondly, supposing the plaintiffs are persons who can object, yet that there is not sufficient evidence that the proposed building would sufficiently obstruct the light to the windows which are to replace the windows of the church to such a degree as to authorise this Court to interfere to the extent of granting an interim.

"Now the first point under the first class of objections, is, that there has been in this case such a unity of possession as would prevent the possibility of there being a servient, and dominant tenement; that there is such a unity of possession therefore, as would prevent the statute from applying so as to raise a prescription of twenty or forty years, or so as to



raise the supposition of a lost grant. I incline myself to think that, if the objection of unity of possession could be maintained, it is equally important with regard to a lost grant as it is with regard to a prescription under the statute. I think that if it were shown that there was such a unity of possession as would prevent the possibility of there being a servient and dominant tenement, this would be fatal to either view. This seems to me to be a very difficult question, and one that requires considerably more knowledge of ecclesiastical law than a Judge can have in his mind at the moment, or at this stage of the proceedings, he is likely to acquire. I am not prepared to say at the present moment whether the rector is merely a bare trustee, whether, being legal owner of the church, he is a bare trustee of the church, or whether his rights with regard to the church and the churchyard are identical, or whether his legal rights with regard to the church and churchyard are the same or not as his rights with regard to the glebe.

"If he be merely trustee of the church, and if he be, in point of law and equity, considered as the owner of the glebe, the inclination of my opinion at present is, that as the real owner of the glebe, he might make that the servient tenement of the church of which he was only trustee, and that where a person is trustee of that which is to be the dominant tenement and is real owner of that which is to be servient tenement, there is not a unity of possession as prevents the application of the statute or the application of the doctrine of the lost grant.

"I therefore think, that at this stage of the proceedings we are entitled to assume that the rector, and therefore the Ecclesiastical Commissioners who stand in his place, are merely trustees of the church. It is, I think, a matter of contention at the present moment whether the proposed new buildings stand on the churchyard or on the glebe, but assuming them to stand on the glebe, I think we are entitled to say at this stage that we cannot assume that there is not

that difference of position which would entitle the application of the statute or the application of the doctrine of the lost grant. Therefore, so far as that objection is taken it cannot avail at the present time, but it is a matter which must be gravely considered at the hearing.

“Then another objection was taken, which was, that these Ecclesiastical Commissioners are only trustees to sell. With great deference, I think it is not worth while to enquire into that point. I confess I have no doubt that even assuming them to be trustees to sell, that cannot oust them from the right to object to an obstruction to the lights of the building which they have to sell. Then it was, that by the statute and the order in council, they have only vested in them the site of the church or the church itself, and that they have not vested in them any rights of easement which the church in other hands would have acquired. I think that that is an equally untenable objection, and about that also I have no doubt.

“Assuming, therefore, that the Ecclesiastical Commissioners are persons who may come to the Court, for such an injunction as is now asked for, there is raised this question, whether such an injunction ought to be granted where the building which was the dominant tenement is not in existence, and has been pulled down. I confess that the way that strikes me is this. We assume for this purpose that the building while it existed had ancient lights and therefore the right to have them unobstructed. The building is pulled down. It is said that right is in abeyance. It seems to me that the right is quite as much in existence after the building is pulled down, or as it was before until that right is abandoned, and I cannot help thinking that where in our country a man has a legal right which can only be lost by his abandoning it if he has not abandoned it, and until he abandons it, it exists, and the right is as much in his possession as ever. The mode of enjoying it may be different but the right is in existence.

“If you assume that he has the right, and it is in his possession and in existence, then if the defendant is about to do an act which will injure that right, I can see no reason why the ordinary doctrine should not be applied and why the Court should not grant the injunction. It seems to me that the case of *Straight v. Burn* is an authority in favour of that proposition, and that was the true ground on which the case was decided, not that there was an undertaking by the plaintiff to rebuild. That seems to me to be immaterial except as evidence to show he has not abandoned his right. The question is whether he had the right, and whether there is evidence to show he has abandoned it. If he has not abandoned it, it exists, and he has a right to come to the Court for such a remedy as is here asked. Therefore, that objection cannot avail.

“Then we come to that which was much urged, which is, what is the amount of obstruction which is necessary for the plaintiff to show in order to obtain this injunction, and upon that arose that doctrine which I confess startled me as to 45°, which is relied upon either as a kind of legal doctrine or as a rule of evidence which is to make a *prima facie* case. I confess that that seemed to me to be contrary to all the authorities in these cases which have always been relied upon and to intimate that a Judge charging a jury would have to tell them ‘if the defendant has left the plaintiff 45° of light that is a *prima facie* case in which there is no injury to the plaintiff,’ unless he can show something particular in the circumstances of the case before him. I never heard of such a mode of directing a jury. The mode of directing a jury has been laid down for years, and the rule has always been since the time of *Back v. Stacey*, that which was laid down by Lord Chief Justice Best in that case, namely, that in order to give a right of action and sustain the issue, there must be a substantial deprivation of light sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed busi-

ness on the premises as beneficially as he had formerly done. That is the ruling which has always been said to put the direction in the clearest point of view ; and it is in accordance with the judgment of Chief Justice Tindal, one of the most careful Judges who ever sat, in *Parker v. Smith*. It was adopted by Lord Chelmsford in the case of *Calcraft v. Thompson* (1) and has always been the received mode. The question is whether there has been, not some interference, but a substantial interference. There is no trace of anything about  $45^{\circ}$  or any other number of degrees.

"Then it was said that that law has been altered by the ruling of Lord Justice James in *Kelk v. Pearson*. I confess that his judgment there seems to me to be directly to the contrary of that for which it is cited, for I find he says: 'Since the statute as before the statute, it resolves itself simply into the same question, a question of degree, which would be for a jury if this were an action at law to determine, but which it is for us as judges of fact as well as law to determine for ourselves as best we may when we are determining in Chancery ;' and he lays down the rule in the very words of Chief Justice Best in *Back v. Stacey*, and Lord Justice Melluish quite as distinctly says, that the question is not what may be considered by some persons as sufficient light in London or anywhere else ; but the question is one of degree and comparison with what the man had before the defendant's act, and with what he has after ; and there must be a substantial difference. In the case of *The City of London Brewery Company v. Tennant*, it seems to me that Lord Justice James laid down again the very same rule, that it is a question of fact and degree in each particular case, and although the Lord Chancellor Lord Selbourne did take notice of that Act of Parliament about the  $45^{\circ}$ , I do not gather that he meant to say more than that the fact of there being  $45^{\circ}$  of light is one of the many facts you are to take into consideration, not as raising a *prima facie* case or anything like it, but one of the facts to be considered

in determining whether there has been a substantial interference with the light the plaintiff had before.

"I have ventured to say this because, to my mind, this notion that some expression of a Judge used when he is deciding a question of fact as to his own view in some one fact, being material, or a particular occasion is to be taken to be a rule of conduct for other Judges in considering a similar state of facts in another case where there are many other differences, is a false mode of treating authority, and that the mere view of a learned Judge in a particular case as to the value of a particular piece of evidence is no good whatever to other Judges who have to determine the matter of fact in other cases where there may be but one fact, but many others as well to be considered. I therefore think that in the present case the interim injunction ought to be granted, but that when the case comes to the hearing there certainly will be a very grave question to be considered by the learned Judge who has to try it."

"COTTON, L. J.—I also am of opinion that in this case the plaintiffs are entitled to an interim injunction.

"It is perhaps unfortunate from the course the case took in the Court below, that only one of the points argued before us was really dealt with by the Vice-Chancellor. I will deal with that first. Now, as I understand, he felt a difficulty in interfering when there was no building existing or in the course of erection, in respect of which the right of light could be enjoyed, and when the plaintiffs were not in a position themselves to rebuild or undertake to do so.

"It was said that the Court would not interfere when no right was being interfered with, so as to make an action at law maintainable; it is unnecessary to give an opinion whether an action at law could be maintained in this case. The question we have to deal with is, whether or no a Court of Equity should interfere to prevent an injury to the plaintiffs. I will assume for the present purpose that these windows in the old church, which for centuries had had

uninterrupted access of light, were windows which were entitled, as of right, to the access of light. Does the fact that the building has been pulled down put an end to the right? That cannot be so. The cases cited have settled that point, because in *Tapling v. Jones*, the building in which the ancient windows were, and by no means of which, that old building had enjoyed the access of light had been pulled down, but yet it was held that when the new building was put up with windows in the old position they were entitled to the old right. The enjoyment no doubt had been discontinued, but the right was continued, and when windows were put up in the same place the owner of the house with these windows was entitled to protection, with respect of the old right. Therefore, there had been no time at which the old right had ceased to exist, although its enjoyment had been suspended; and the cases have gone further than that, for in *Straight v. Burn*, where the bill was filed at a time when there was no actual building but only a bit of wall remaining, Lord Justice Giffard granted an injunction, on an undertaking by the plaintiff that he would without delay, rebuild, putting the window in the old position. That recognises that even when there is no building existing—because the old wall could hardly be considered as ‘a house, workshop, or other building’ within the meaning of the statute—still the Court would interfere by means of an injunction to protect that which the plaintiff had a right to, and to secure for him the future enjoyment under the old right. But then it was said here that the plaintiffs themselves cannot rebuild, and that, therefore, what they have to do is to sell the site and the site only. I will deal with the latter part of the objection first. They have, as I understand, vested in them under the Act of Parliament, the building and fabric of the church and the ground on which it stood, and they vested in them that building with everything in the way of light which that church and the owner of that church enjoyed. No doubt they were required

to pull it down and sell it, but in selling the site, in my opinion, they could convey to the purchaser all the rights they themselves would have had if they had been in the position of ordinary owners having acquired that land, with the intention or obligation to pull down, as in a building lease, to pull down the old building and put up a new one, when, if they desired to protect their rights, that is, to continue the enjoyment of the old right of light, they could have put up the windows in the same position as formerly. Therefore, although they themselves cannot rebuild, and are required to sell, in my opinion they can convey to the purchaser the same right which, if they had built, they would have had of putting up a building with windows in the old places, and entitled to the old easement.

“Then it was said there is a difficulty in granting an injunction; because how can we know that the building will be put up, or that, if the building is put up, the windows will be in that position. We are now dealing with an interlocutory injunction only, and, upon the evidence, and from the position of this property, I should say we must arrive at the conclusion, that, within a short time, having regard to its situation, not only will the land be sold, as the plaintiffs are bound to try and sell it, but that it will be covered with buildings, and I think we may come to the conclusion as judges of fact, that in all probability the purchaser will put up his building so that the windows may have the enjoyment of the old right of light. If on the hearing of this action, the property has not been sold, and no intention is shown of putting up buildings, and if it is not shown satisfactorily to the Court, what will be the position of the buildings or the windows in it, then probably the difficulty will have to be met. But I think it will have to be met, not by putting the plaintiffs or the owners under an undertaking, but by giving some liberty to the defendant to apply to dissolve the injunction so as to prevent him from being kept perpetually under this injunction, when, in fact the plaintiffs, or the purchasers

from them, have abandoned the right to put up the windows in the old place in exercise of the old right. This is not for decision now, but that, in my opinion, would be one mode of dealing with the difficulty, and preventing any injustice being done.

"Then there are other points in the case, and, of course, upon an application for an interlocutory injunction, we ought to be satisfied that a *prima facie* case is made out by the plaintiffs who are applying for an injunction. Now the first objection on the part of the defendants is this, that these windows in the old church were not entitled to light. The building had existed for two centuries, but there had been on the site of that building, another building previously. Are we to come to the conclusion that the plaintiffs under those circumstances have not a *prima facie* case to say that these windows had a right to light?

"It would require a strong case I think, after such a lapse of time, to induce us to hold, upon an application for an interlocutory injunction, that the defendant was entitled to erect a building, which for the present purpose I must assume will materially interfere with those lights, if ancient, and will materially embarrass the plaintiffs in dealing with the property in the way they are bound to do.

"Suppose that this piece of land on which the house is intended to be built was glebe, and has been so as long as the church has been there, I am not satisfied that the parson could not, with consent of the patron and ordinary, deal with his glebe in such a way as, at least in this Court, to entitle those who could use and enjoy the church to say, 'You have precluded yourself from ever interfering with the lights that there are in the church,' because we must recollect that, as regards his glebe, the parson, with consent of the patron and ordinary, could, by certain deeds, independent of the restraining statutes (and this church existed before the restraining statutes were passed), deal with and bind the glebe.

"The other question which we must consider is, whether or



no the works which the defendant is intending to put up will substantially interfere with the beneficial use of the building which will probably be put up there? I say, 'with the beneficial use of the building;' because it is not probable that any dwelling-house would be put up in this place, and the rule with regard to dwelling-houses is somewhat different; namely, that there must be a substantial interference with the comfortable enjoyment of the house.

"We must consider whether or no there is a substantial interference with the light, having regard to the use to which the building in this place will be put. That is more favourable to the defendant than the other view. I think upon the evidence of the experts, I should be satisfied that that was so; but we must judge by our own eyes and our own senses. Can we think that raising that building as proposed in that position and at that distance will not materially diminish the access of light to the windows put up in the old place? If so, having regard to what we know of the use of light in these warehouses, I should say, that they would probably substantially interfere with the beneficial use of any warehouse which might be erected there. As to the fact that there could be no warehouse erected there which would not interfere with the defendant's lights, I have seen, and it is common knowledge that there are plenty of warehouses in the city of London consisting of different stages and degrees, one part of which is thrown back to a great height, but a portion of which occupying the old site of these windows would be built at such a height as that it would not in any way interfere with the lights of the defendant, or give him a cause of complaint.

"I think I ought to add one word about the angle of  $45^{\circ}$ . Although I quite agree with what Lord Justice Brett has said, I think that the way in which this provision as to  $45^{\circ}$  has been dealt with by Judges in the Chancery Division is unfortunate. It seems to me to have arisen from referring loosely to the Metropolitan Building Act, without looking at the clause. That clause really is intended to deal with the

question of the width of the streets, so as not to have them formed into a narrow trough, and is not intended to lay down any rule applicable to the light which a man is entitled to enjoy in the city of London. The angle of  $45^{\circ}$  is not the angle taken from the windows, but from the top of one house to the level of the street on the other side, and therefore, to derive from that any other rule as to what is to guide us in saying whether or no there has been a substantial interference with the use and enjoyment of the building as regards light, is in my opinion, looking to a rule laid down for one purpose to guide us as to an entirely different matter. I should not have referred to it but for that reason. When that is the condition, under ordinary circumstances, there would probably be no substantial interference with the enjoyment; but that is not a rule to put before a jury to guide them; or a rule which is to guide the Court in coming to the decision whether there is a substantial interference; but it is only a circumstance which will very often be a sufficient guide. We must take this into consideration.

"Then ought we to interfere by injunction after the undertaking that has been offered? Probably if the plaintiffs had been only persons in the position of owners going to rebuild, I, for my own part, might have been satisfied with that undertaking, and for this reason—because then we should have had the means of testing by experience and not by mere argument, what would be the effect of the defendant's building. When such an undertaking is offered (and I am glad of having the opportunity of repeating this as far as I am concerned), it must never be made illusory. It is an undertaking given by the defendant, who says, 'my works can never interfere with your lights,' and if it be found they do, his undertaking ought to be rigorously enforced, and he never ought to escape by the suggestion that, as the building is up, damages ought to be given instead of a perpetual injunction. In the present case the plaintiffs are in a peculiar position. They cannot build themselves, but they are bound to sell, and, as they are not satisfied with

that undertaking, and consider it more for their interest, having regard to the proposed sale, to have an injunction to prevent the building being erected, or anything being done which could interfere with the access of light to windows put in the original position—at least, until the rights of the parties are decided.”

“JAMES, L. J. With regard to the argument that there was a legal impossibility in a church acquiring an easement over the glebe; I say this, that as far as at present advised, I think there might have been a grant or a covenant by the rector, to or with the churchwardens on behalf of the parish, made with the proper consents, that the church should for ever have the access of light and air to the windows, I can see no legal difficulty in the way of framing or presuming such a covenant; nor do I see, at present, any doubt as to the legal validity of such a covenant.”

Having treated of how the right to light and air may be acquired, and what acts, although apparently injurious to that right, do not really affect it, we shall next consider how the right may be jeopardised, which will be set forth in Table IV., and then how such right may be lost, which we set out in Table V.; and thereafter we shall give Table VI., setting forth what it is necessary for the surveyor to consider in estimating the damage or injury.

TABLE IV.

*How ancient light may be jeopardised.*

1. By alterations.
2. By variations of the plane at which light is admitted.
3. By advancement of a wall.
4. By removal of buildings.
5. By the occupation by the dominant owner of the servient owner's premises.
6. By ownership of both properties being in the same parties.

*As to item 1.* The most important case bearing upon this subject is *Tapling v. Jones*, which was fought up to the House

of Lords, and heard there on the 17th, 20th, 21st of February, and 16th March, 1865, the action having been commenced in the Court of Common Pleas on the 24th of February, 1858. So valuable is this case, that I am sure this work would not be complete if I did not quote it at length from 34 Law Journal Reports (N. S.), C. P. 342:—

“This action was brought in the Court of Common Pleas, on the 24th of February, 1858, and was brought for an alleged obstruction of the access of light and air to certain windows in the west side of a warehouse, No. 107, Wood Street, Cheapside, in the city of London, the property of the respondent, the defendant in error, and the plaintiff below.

“The declaration consisted of two counts. The first count alleged a right on the part of the defendant in error to the access of light and air to certain ancient windows of a messuage and building in that count mentioned, and stated, by way of breach, that the plaintiff in error, by wrongfully building and continuing a wall near to such windows, prevented the light and air from coming to or entering the same. The second count alleged a right to the unobstructed access of light and air to the said windows, and averred as a breach that such access was obstructed by the wrongful continuance of a wall, on a close opposite and near to such windows.

“The defendant pleaded, first, not guilty; secondly, a traverse of the right alleged in the first count; and, thirdly, a traverse of the right alleged in the second count.

“There was a replication joining issue on these pleas.

“Upon these issues the cause came on to be tried, at the sittings at the Guildhall of the city of London, on the 16th of February, 1859, when a verdict was entered for the defendant in error, for the damages claimed in the declaration, subject to a special case. A special case was afterwards stated, which, so far as it is material, was to the following effect:—

“The plaintiff is a wholesale dealer in silk, and now carries

on his business at Nos. 107, 108, and 109, Wood Street. The plaintiff had for several years prior to 1857 carried on his business at Nos. 108 and 109, Wood Street, but he acquired possession of the premises, No. 107, Wood Street, for the first time, in the year 1857, having become the purchaser of them in the month of July in that year. Up to the time when the plaintiff acquired possession of the said premises, No. 107, they were used and occupied as a public-house, known by the sign of the 'Magpie and Pewter Platter,' and were, and are, in a line with and next adjoining. Nos. 107, 108, and 109 abut on the rear or west side thereof, upon the east side of certain premises fronting in Gresham Street West, and therein numbered 1 to 8, hereinafter called the Gresham Street property. In the year 1852 the plaintiff pulled down his premises, Nos. 108 and 109, Wood Street, which were then old and dilapidated houses, and erected on their site new warehouses. In doing so, he altered the position and enlarged the dimensions of the windows previously existing, increased the height of the building, and set back the rear or back line of those warehouses.

"The defendant, who is a carpet-warehouseman, on the 23rd of July, 1852, was tenant of the said Gresham Street property, and now holds the same under a lease for a term of eighty-one years since granted to him. In and about the year 1856, the defendant pulled down the buildings then standing on the Gresham Street property in order to erect thereon a warehouse.

"The plaintiff in July 1857, immediately after his purchase of No. 107, Wood Street, made alterations in it by lowering the first and second floors so as to make them correspond with his adjoining new warehouses, Nos. 108 and 109, and by lowering two of the windows in such floors so as to suit the new position of the floors. One of the lower windows was about one foot longer than before, and the other about the same size as the old one, and both occupied parts of the old apertures. A small window on the first floor was blocked

up. He also built two additional stories to No. 107, in the first of which, viz. the fourth story of the premises, he put out a new window, and in the fifth or attic story he placed a window extending across the entire width of the building. These new windows and lights were so situated that it was impossible for the owners of the said Gresham Street property to obstruct or block them without also obstructing or blocking, to an equal or greater extent, that portion of the said windows and lights which occupied the site of the said ancient windows in No. 107.

“The said alterations and additions in No. 107, Wood Street, so far as the windows are concerned, were completed by the plaintiff in the month of August, 1857.

“After the alterations and additions to No. 107, Wood Street, had been so completed, the defendant proceeded to erect his said intended warehouse and premises on the Gresham Street property, and built up the eastern wall thereof to such a height as to obstruct the whole of the windows and lights of No. 107, Wood Street.

“The defendant refused to remove the said eastern wall of his warehouse and premises, or any part of it.

“The question for the opinion of the Court is, whether the plaintiff is entitled to recover in respect of the obstruction of light and air complained of. If they are of opinion that he is so entitled, then the verdict entered for the plaintiff is to stand, and the damages to be reduced to 40s.; if they think the plaintiff is not so entitled, then the verdict entered for the plaintiff is to be set aside, and a verdict entered for the defendant.’

“The Judges for the Court of Common Pleas were equally divided in opinion, the Lord Chief Justice and Mr. Justice Williams being in favour of the plaintiff below, Mr. Justice Keating and Mr. Justice Byles being in favour of the defendant below. Mr. Justice Keating thereupon withdrew his opinion, and judgment was given in favour of the plaintiff below.

"The defendant below brought error upon that judgment, and the Court of Exchequer Chamber affirmed the judgment. There was a difference of opinion among the judges, Mr. Justice Wightman, Mr. Justice Crompton, Mr. Baron Bramwell, and Mr. Justice Blackburn being in favour of the plaintiff below, and the Lord Chief Baron and Mr. Baron Martin being in favour of the defendant below.

"The Attorney-General and Archibald for the appellant. The right to an easement must rest on some presumed grant, and the extent of the grant is always to be referred to, and measured by, the user and the effect of it.

"The cases show that whatever may be the origin of the right, such right is measured by usage; so, if the effect on the property subject to the right is varied, the party having the right cannot claim the benefit of the right as to the old part which has remained unaltered, so as to shield the user of the new part. Such an alteration sets the owner of the servient tenement free to protect himself. As to the origin of the right being presumed to be in grant before the Prescription Act, *Daniel v. North*; *Barker v. Richardson*, the old theory of the law still remains: *Bright v. Walker*. The effect of material alterations which, if acquiesced in, would increase the servitude of the servient tenement, is to destroy the servitude, unless the new encroachment can be shut out without affecting the old right. The consent is to a different thing. The old right cannot be used as a shield for fresh encroachment. The continuance of what the servient tenant has done to protect himself from such encroachment cannot be prevented by the owner of the dominant tenement restoring the property to its original state. The servient tenant consented only to something of which the dominant tenant has deprived himself of the right to insist upon by altering the state of circumstances: *Luttrell's Case*. The first case having direct application to the present is *Cherrington v. Abney*, and see Com. Dig. and *Martin v. Goble*. The cases of *Dougall v. Wilson*, *Cotterell v. Griffiths*, *Chandler v. Thompson*,

and *Thomas v. Thomas* are not relied upon, but merely mentioned in their order of date. The latter cases on which reliance is placed are *Garritt v. Sharp*, *Blanchard v. Bridge*, *Renshaw v. Bean*, *Wilson v. Townend*, *Davies v. Marshall*, *Cooper, v. Hubbuck*, and *Hutchinson v. Copestake*. The opinion of the majority of the judges in the present case has been approved of by Vice-Chancellor Wood, in *Weatherby v. Ross*. The respondent abandoned his old rights; he had no intention of resuming them when he made the alterations, and he cannot resume them now: *Liggins v. Inge*; *Stokoe v. Singers*; *Gale on Easements*, pp. 500, 483-4; and *Martin v. Hendon*.

"Sir H. Cairns, and Cleasby, for the respondent, were not called upon.

"THE LORD CHANCELLOR.—By the third section of the Act 2 & 3 Will. 4, c. 71, intituled An Act for Shortening the Time of Prescription in certain Cases, it is enacted, 'that when the access and use of light to and for any dwelling-house, workshop, or any other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

"Upon this section it is material to observe, with reference to the present Appeal, that the right to what is called 'an ancient light' now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be vested on, any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. This observation is material, because I think it will be found that error in some decided cases has



arisen from the fact of the Courts treating the right as originating in a presumed grant or licence.

“It must also be observed, that after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible; and it would seem, therefore, that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment not amounting to abandonment. Moreover, this absolute and indefeasible right, which is the creation of the statute, is not subjected to any condition or qualification; nor is it made liable to be affected or prejudiced by any attempt to extend the access or use of light beyond that which, having been enjoyed uninterrupted during the required period, is declared to be not liable to be defeated.

“Before dealing with the present Appeal, it may be useful to point out some expressions which are found in the decided cases, and which seem to have a tendency to mislead. One of these expressions is the phrase ‘right to obstruct.’ If my adjoining neighbour builds upon his land, and opens numerous windows which look over my garden or my pleasure-grounds, I do not acquire for this act of my neighbour any new or other right than I before possessed. I have simply the same right that I before possessed; I have simply the same right of building or raising any erection I please on my own land, unless that right has been, by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbour.

“Again, there is another form of words which is often found in the cases on this subject, namely, the phrase ‘invasion of privacy by opening windows.’ That is not treated by the law as a wrong for which any remedy is given. If A. be the owner of beautiful gardens and pleasure-grounds, and B. is the owner of an adjoining piece of land, B. may build upon it a manufactory with a hundred windows overlooking the pleasure-grounds, and A. has neither more nor less than the right which he previously had, of erecting on his land a

building of such height and extent as will shut out the windows of the newly erected manufactory.

"If in lieu of the words, 'the access and use of light to and for any dwelling-house,' in the third section of the statute, there be read, as there well may, 'any window of any dwelling-house,' the enactment (omitting immaterial words) will run thus: 'When any window of a dwelling-house shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right to such window shall be deemed absolute and indefeasible.'

"Suppose, then, that the owner of a dwelling-house with such a window, that is, with an absolute and indefeasible right to a certain access of light, opens two other windows, one on each side of the old window, does the indefeasible right become thereby defeasible? By opening the new windows he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of building on his land; but it must be remembered that he possesses no right of building so as to obstruct the ancient window; for to that extent his right of building is gone by the indefeasible right which the statute has conferred.

"Believing this to be the sound principle, I cannot accept the reasoning on which the decisions in *Renshaw v. Bean*, and *Hutchinson v. Copestake*, were founded. The facts of these two cases were not exactly the same as in the present; for in neither was any ancient window preserved unaltered, but the old windows had been enlarged, and new ones added; in which state of things it was held, that inasmuch as it was not possible for the adjoining proprietor to obstruct the new windows and the access of the ancient lights, without at the same time obstructing the original apertures, the owner of the house must be considered as having lost his right to the ancient lights, at all events until he restored his house to its original condition.

"According to these cases, the law must be thus stated,

namely, if the owner of a dwelling-house with ancient lights opens new windows in such a position as that the new windows cannot be conveniently obstructed by an adjoining proprietor without obstructing the old, he, the adjoining proprietor, is entitled so to do, at all events so long as the new windows remain. Upon examining the judgments, it will be seen that the opening of the new windows is treated as a wrongful act done by the owner of the ancient lights, which occasions the loss of the old right he possessed; and the Court asks whether he can complain of the natural consequence of his own act.

“I think two erroneous assumptions are involved in or underlie this reasoning; first, that the act of opening the new windows was a wrongful one; and, secondly, that such wrongful act is sufficient in law to deprive the party of his right under the statute. But, as I have already observed, the opening of the new windows is in law an innocent act, and no innocent act can destroy the existing right of the one party, or give any enlarged right to the other, namely, the adjoining proprietor.

“In the present case an ancient window in the plaintiff's house has been preserved, and remained unaltered during all the alterations of the building, and the access of light to that window is now obstructed by the appellant's wall. A majority of the Court below have held that the obstruction was justified whilst the new windows, which the plaintiff some time since opened, remained, but was not justifiable when those new windows were closed, and the house, so far as regards the access of light, was restored to its original state; but, on the plain and simple principles I have stated, my opinion is that the appellant's wall, so far as it obstructed the access to the respondent's ancient unaltered window, was an illegal obstruction from the beginning; and I have great difficulty in acceding to the reasoning that this permanent building of the appellant was a legal act when begun and completed, but has subsequently become illegal through a

change of purpose on the part of the respondent. On such a principle, the person who opens new lights might allow them to remain until his neighbour, acting legally according to these judgments, has at great expense erected a dwelling-house, and then, by abandoning and closing the new lights, might require his neighbour's house to be pulled down. I think the judgment ought to be affirmed, but not on the ground or for the reasons given by the majority of the judges in the Courts below. I therefore move, your lordships, that the judgment of the Court below be affirmed."

"LORD CRANWORTH.—My lords, the question raised by the special case is, whether the plaintiff in error was justified in erecting, opposite and near to the house of the defendant in error, a building which prevented the access of light and air, through which light and air has been accustomed to pass to the house in question without interruption.

"Previously to the erection by the plaintiff in error of the buildings complained of, the defendant in error made extensive alterations in his house, and in so doing opened new and enlarged several of the old windows; and it was not disputed that the plaintiff in error was justified in obstructing the new and the enlargements of the old windows. He effected this obstruction by erecting a permanent building on his own land, so near to the house of the defendant in error as to obstruct the whole of his lights, the old as well as the new. The special case finds as a fact that it was impossible for him to obstruct or block the new windows, without at the same time obstructing or blocking that portion of the windows and lights which occupied the site of the ancient windows; and his counsel argued, on the authority of *Renshaw v. Bean*, that under these circumstances he had a right to erect the building in question. After it had been so erected, the defendant in error caused the altered windows to be restored to their original state, and he also filled up with brickwork the spaces occupied by the new windows; and having done this, he called on the plaintiff in

error to remove the building which thus blocked up the ancient and only the ancient window.

"This application was not complied with, and thereupon the defendant in error brought his action in the Court of Common Pleas against the plaintiff in error for obstructing his ancient lights.

"At the trial a verdict was found for the plaintiff in error, subject to a special case; which was afterwards argued before the Court of Common Pleas; and the Court being equally divided in opinion, the junior judge, following the usual practice, withdrew his opinion, and judgment was then given for now defendant in error, according to the opinions of what was then the majority of the Court.

"The case was then brought to the Court of error, where the judgment below was affirmed, four of the six learned judges who heard the case concurring in opinion with the Court of Common Pleas in favour of the defendant in error, and two dissenting. The case was then brought by writ of error to this House and the plaintiff in error was heard at the bar. We did not call on the defendant in error to support his case, being of opinion that the plaintiff in error had laid no ground for disturbing the judgment below, though our opinion was not founded on the same ground as that on which the majority of the judges below seem to have proceeded.

"The case raised two questions. First, whether the plaintiff in error was justified in erecting the building whereby the access of light and air to the house of the defendant in error was obstructed? and secondly, if he was, then whether he was bound to remove it after the windows of the defendant's house had been restored to their ancient condition? The second question does not arise, and I will therefore proceed to state shortly the grounds on which my opinion rests.

"The right to enjoy light through a window looking on a neighbour's land, on whatever foundation it might have rested

previously to the passing of the 2 & 3 Will. 4, c. 71, depends now on the provisions of that statute.

“The special case finds that the windows of the house of the defendant in error, previously to the alterations made by him in 1857, were ancient windows; by which we must understand windows through which he had enjoyed access of light without interruption for twenty years. His right, therefore, to that light was by the express provision of the statute absolute and indefeasible. It is not disputed that, when the plaintiff in error erected his wall, he obstructed the light to which the defendant in error was so entitled, and that so he prevented him from enjoying what the statute declares was his absolute and indefeasible right. The plaintiff in error, in justification of the course he took, relies on the fact that, before he raised his wall and so caused the obstruction complained of, the defendant in error had made material alterations in his house, enlarging the old windows and adding new ones. There was nothing to make it unlawful for the plaintiff in error to obstruct the access of light to these new windows, and to so much of the altered old windows as did not occupy the old site through which light had formerly passed; and as it was impossible to do this without at the same time obstructing the light which had previously passed through the old windows (so at least we must take the fact to be), the plaintiff in error contends that he had a right to obstruct the whole.

“I am unable to comprehend the principle on which such a claim can rest. Where a person has wrongfully obstructed another in the enjoyment of an easement, as, for instance, by building a wall across a path over which there is a right of way, public or private, any person so unlawfully obstructed may remove the obstruction; and if any damage thereby arise to him who wrongfully set it up, he has no right to complain. His own wrongful act justified what would otherwise have been a trespass. But this depends entirely on the circumstances that the act of erecting the wall was a

wrongful act; whereas the opening of a window is not an unlawful act. Every man may open any number of windows looking over his neighbour's land; and, on the other hand, the neighbour may, by building on his own land within twenty years after the opening of the window, obstruct the light which would otherwise reach it. Some confusion seems to have arisen from speaking of the right of the neighbour in such a case as a right to obstruct the new lights. His right is a right to use his own land by building on it as he thinks it most to his own interest, and if by so doing he obstructs the access of light to the new windows, he is doing that which affords no ground of complaint. He has a right to build, and if thereby he obstructs the new lights, he is not committing a wrong. But what ground is there for contending that, because his building so as to obstruct a new light would afford no ground of complaint, therefore, if he cannot so build without committing a trespass, he may commit a trespass? I can discover no principle to warrant any such inference.

"I will put this case: Suppose the owner in fee simple of close A. were to build a house at the edge of close A., with windows overlooking close B., held by himself, as tenant for life, or by a tenant for life, who, from feelings of kindness, would not object to the opening of the windows of the new house; at the end of twenty years he would, according to the third and seventh sections of the Act, have acquired an absolute and indefeasible right to the access of light across close B. It surely cannot be contended that the remainderman, because he could not otherwise prevent the owner of the house from acquiring this right, might, before the expiration of twenty years, come on the land of the tenant for life, and there erect a building to obstruct the light of the new windows. And yet the argument of the plaintiff in error must go this length, for there is no difference in principle between a trespass on the soil and any other trespass.

“In the case under discussion, the new windows were opened by the same person who had a right to access of light through the old windows; but this might have been otherwise. Suppose the owner of an ancient window on a first floor not to be the owner of the second floor, and that the owner of that floor should open a window which the owner of the adjoining land could not obstruct without at the same time obstructing the ancient light; no one, I suppose, would argue that in such a case the owner of the land overlooked could obstruct the ancient light, and yet I can see no difference in principle between the two cases. It may be said that, in the case I have just put, the owner of the ancient light was in no default, and could not be affected by the act of a stranger. If after the owner of the second floor had opened a new window, and within twenty years the owner of the first floor had purchased the second floor, would the continuance by him of the new window authorise the neighbour in obstructing the old light, if he could not otherwise obstruct the new one? This will hardly be contended. So, again, suppose the owner of the first floor to have demised the second floor to a tenant and that he, without the licence of his landlord, put out the new window; this might entitle the landlord to complain of his tenant as having been guilty of waste, but it can hardly be contended that it would justify the neighbour in obstructing the ancient light enjoyed by the landlord. So, again, if the landlord had given his permission to the tenant to open the window, I cannot see any difference which this would make; the tenant would, *quoad hoc*, be unimpeachable of waste; but it would be lawful to the landlord to make such a demise, which could not in any respect affect the relative rights of the landlord and his neighbour.

“Suppose the owner of a house has a right of way to the door of his house over his neighbour's land, a case put by Mr. Justice Blackburn in his judgment, the argument of the plaintiff in error would go to show that if the owner of the



house should put a pane of glass in his door, his right of way would or might be at an end. For it would be lawful for the neighbour to obstruct it, if he could not otherwise obstruct the light.

"I will not, however, multiply illustrations. The plain principle seems to me to be, that no one can interfere with the absolute and indefeasible right of another, unless where such interference is made necessary by the wrongful act of the party possessing the right.

"I do not attempt to disguise from myself that, unless the facts of this case can be distinguished from those in *Renshaw v. Bean*, the conclusion at which I have arrived is directly at variance with the decision of the Court of Queen's Bench in that case. But I own I think that the facts there were substantially the same as those now before us, and the Court decided there that the obstruction of the ancient light was in such a case justifiable. Lord Campbell, in delivering the judgment of the Court in that case, stated the Court did not proceed on the ground that the plaintiff, whose ancient lights were obstructed, had lost the rights which he had previously enjoyed of having light and air through such portions of the new windows as had formed portions of the ancient windows; but his lordship added, 'If, by the alterations which the plaintiff made, he exceeded the limits of that right, and so put himself into such a position that the access could not be obstructed by the defendant without at the same time obstructing the former right of the plaintiff, he has only himself to blame.' The observations I have already made sufficiently indicate the reasons on which I cannot assent to this reasoning; and unless that reasoning be sound, the judgment cannot be supported.

"The case of *Renshaw v. Bean* was followed by that of *Hutchinson v. Copestake*, not only in the Court of Common Pleas, where the decision of the Court of Queen's Bench was considered to be binding, but also in the Exchequer Chamber, though there some of the judges seem to have proceeded on

the special facts of that case. It is, however, the duty of this House, as the ultimate Court of Appeal, to lay down the law on what they consider to be correct principles; and though we should be slow to decide contrary to the decisions of the Courts of Westminster Hall, where they have been long received and acted on, even if we see cause to question the grounds on which they were supposed to rest, yet no such principle ought to restrain us from correcting what we consider to have been an erroneous decision pronounced only thirteen years ago; more especially when we have, as in this case, the opinions of two very learned judges expressing their very decided dissent from it, and when we think we can discover in judgments of the Chief Justice of the Common Pleas and of Mr. Justice Williams great doubts, to put it no higher, of the soundness of the decision which we are overruling. My clear opinion is that the judgment below ought to be affirmed.

“**LORD CHELMSFORD.**—My lords, I agree with the judgment of the Court of Exchequer Chamber, but on different grounds from those on which it proceeded.

“The only facts of the special case which are necessary to be noticed are: That in making the alterations in his house, which originally consisted of three stories, with one window in each story, the respondent altered the windows in the two lower stories, but so as to make them both occupy part of the old apertures, and retained the window on the third story, unaltered, and built two additional stories, in each of which he put out a new window. That after these alterations were completed, the appellant, who had previously made preparations for erecting a warehouse on the site of some old buildings which he had pulled down, built up a wall to such a height as to obscure the whole of the lights in the respondent's buildings; it being impossible (as the special case states) for the appellant to obstruct or block up the upper windows without obstructing or blocking up the portion of the windows or lights which occupied the site of the ancient

windows. The special case also states that the new upper windows could not have been obstructed in a more convenient manner (by which I understand more convenient for the appellant) than by building up a wall of sufficient height on his premises. After the appellant's wall was finished, the respondent caused the altered windows in his building to be restored to their original state, and the new windows in the upper stories to be blocked up, and then called upon the appellant to pull down his wall and restore to the respondent's premises their former light and air. The appellant refused, and thereupon the action was brought.

"Upon this state of facts two questions have been raised. First, whether the appellant can justify the obstruction of the ancient lights in the respondent's house on the ground that it was otherwise impossible for him to obstruct the new lights? Secondly, supposing him to have this right, whether it continued after the necessity for its exercise ceased, by the discontinuance of the new lights?

"The first question brings directly into review before this House the decision of the Court of Queen's Bench in the case of *Renshaw v. Bean*, which in its circumstances (as stated by Lord Campbell in his judgment) closely resembled the present case. The Court there held that 'the plaintiff having by the alterations which he made exceeded the limits of his former rights, and put himself into such a position that the access could not be obstructed by the defendant in the exercise of his lawful rights, on his own land, without at the same time obstructing the former right of the plaintiff, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had, at all events until he should, by himself doing away with the access and restoring his windows to their former state, throw upon the defendant the necessity for so arranging his buildings as not to interfere with the admitted right.'

"In this statement of the grounds of decision the word 'right' does not appear to be used with appropriate pre-

cision and accuracy. It is not correct to say that the plaintiff, by putting new windows into his house, or altering the dimensions of the old ones, 'exceeded the limits of his right,' because the owner of a house has a right at all times (apart, of course, from any agreement to the contrary) to open as many windows in his house as he pleases. By the exercise of the right he may materially interfere with the comfort and enjoyment of his neighbour, but of this species of injury the laws takes no cognizance. It leaves everyone to his self-defence against an annoyance of this description; and the only remedy in the power of the adjoining owner is to build on his own ground, and so to shut out the offensive windows. But as it would be hard upon the owner of a house, to which the free access of light and air had been permitted for a long period, to continue for ever indebted to the forbearance of his neighbour for its enjoyment, the courts of law, upon the principle of quiet possession, formerly held that where there had been an uninterrupted use of lights for twenty years, it was to be presumed that there was some grant of them by the neighbouring owner, or, in other words, that he had by some agreement restricted himself in the otherwise lawful employment of his own land. The Prescription Act (2 & 3 Will. 4, c. 71) turned this presumption into an absolute right, founded upon user on one side and acquiescence on the other.

"It was argued, on behalf of the appellant, that under this Act the right to the enjoyment of light was still made to rest on the footing of a grant. I do not see what benefit his case would derive from the establishment of this position; but it appears to me to be contrary to the express words of the statute. By the Prescription Act, after twenty years' user of lights, the owner of them acquires an absolute and indefeasible right, which so far restricts the adjoining owner in the use of his own property that he can do nothing upon his premises which may have the effect of obstructing them. The right thus acquired must necessarily be confined to the

exact dimensions of the opening through which the access of light and air has been permitted. As to everything beyond, the parties possess exactly the same relative rights which they had before. The owner of the privileged window does nothing unlawful if he enlarges it, or if he makes a new window in a different situation. The adjoining owner is at liberty to build upon his own ground so as to obstruct the addition to the old window, or to shut out the new one; but he does not regain his former right of obstructing the old window, which he had lost by acquiescence: nor does the owner of the old window lose his former absolute and indefeasible right to it, which he had gained by length of user. The right continues uninterruptedly until some unequivocal act of intentional abandonment is done by the person who has acquired it, which will remit the adjoining owner to the unrestricted use of his own premises.

"It will, of course, be a question in each case whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention is clearly manifested, the adjoining owner may build as he pleases upon his own land; and should the owner of the previously existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval; for a right once abandoned, is abandoned for ever. But the counsel for the appellant carried their argument far beyond this point. The part of the case which was the most difficult for them to encounter was that which relates to the unaltered window in the third floor. As to this, they contended that the alteration of the windows above so changed the character of the previously acquired right to light and air as entirely to destroy it. But it is not easy to comprehend how this effect can be produced by acts wholly unconnected with an ancient window, which the owner has carefully retained in its original state. And the learned counsel did not seem to expect much success from their argument in its

application to the unaltered window, but directed it, with more plausibility, to the alterations of the windows on the lower floors. As to these, they contended that the owner of ancient windows is bound to keep himself within their original dimensions; and that if he changes or enlarges them in any way, although he retains the old openings, in whole or in part, he must either be taken to have relinquished his right or to have lost it. But upon what principle can it be said that a person, by endeavouring to extend a right, must be held to have abandoned it, when, so far from manifesting any such intention, he evinces his determination to retain it, and to acquire something beyond it? If, under such circumstances, abandonment of the right cannot be assumed, as little can it be said that it is a cause of forfeiture.

“It must always be borne in mind that it is no unlawful act for the owner of a house to break out a window, or to enlarge an ancient window, although in the latter case some difficulty may be thrown upon an adjoining owner to distinguish the old part from the new, and so to ascertain which part he has a right to obstruct, and which is privileged from his obstruction. The alterations may be of such a nature (as in the present case) as to make it impossible for him to prevent the further restriction of his liberty to build on his own premises, without at the same time interfering with the right previously acquired against him. Yet it would be a very strange extension of the law of forfeiture, to hold that the owner of an ancient window, doing nothing but what he may lawfully do, loses his existing right, because it stands in the way of the means of interfering with an act against which the owner of the adjoining land would otherwise have been able and would have been entitled to defend his property. Even supposing what was done by the respondent amounted to an unlawful encroachment, the question put by Mr. Baron Alderson in *Thomas v. Thomas* appears to be unanswerable: ‘How does the plaintiff, by claiming more than he lawfully may, destroy his title to that which he

lawfully may claim?' But the Court of Queen's Bench, in the case of *Renshaw v. Bean*, held that 'because the respondent, in the exercise of his lawful rights on his own land, could not obstruct (what they called) the access of the plaintiff's former right, without obstructing that former right, he had only himself to blame for the existence of such a state of things, and must be considered to lose the former right which he had.' This doctrine appears to me to be founded neither upon principle nor upon authority. It amounts to this: The plaintiff, having acquired an absolute right to ancient windows against the defendant, does an act which it was lawful for him to do, subject to the right of the defendant to render it useless; but because he has contrived his measures so as to prevent the defendant hindering the attempt to obtain a new right without destroying, or at least suspending, the exercise of the old, therefore the old right may be lawfully interrupted, if indeed it is not altogether lost.

"It may be said (and this was urged in argument at the bar) that, unless such is the law, a person who has an ancient window may acquire a right to any number of additional windows, by so contriving their position as to place them completely under the protection of the ancient window, and thus effectually prevent the adjoining owner's interference with them. Undoubtedly, this is a very possible case; and yet there does not appear to be anything unreasonable or unjust in denying, even under such circumstances, a power over the ancient lights which did not previously exist; for consider the case upon the presumption of a grant as it stood before the Prescription Act. The rights of the parties would, of course, be taken to be regulated by such grant, and it would have been contrary to principle to permit the grantor to derogate from his own grant, merely because he could not otherwise prevent an act which might prejudicially affect him, but which the grantee was not prohibited from doing by law. And pre-

cisely the same consequences seem to follow from the right being now acquired by user and acquiescence—while the user is ripening into a right, the adjoining owner has the power completely in his own hands. If he has no objection to the particular window, but is desirous of preventing any enlargement or alteration of it, or any new window being opened, he may inform his neighbour of his determination to build up against the window unless he will enter into an agreement not to enlarge or alter it, nor to open any new one without his permission.

“The adjoining owner can, therefore, always protect himself by a little vigilance; and if he allows rights to be acquired, under shelter of which he is prevented using his land for the purpose of defence against the acts of his neighbour, he must blame his own want of foresight and precaution, and not the law, which will not permit an ancient right to be invaded upon any such assumed ground of necessity.

“I am therefore of opinion that the case of *Renshaw v. Bean* cannot be supported, and that the appellant cannot justify the erection of his wall, and the consequent obstruction of the ancient lights on the respondent’s building.

“The determination of the first question in the respondent’s favour renders it unnecessary to consider whether the respondent had a right to insist upon the removal of the appellant’s wall, after he had restored his windows to their original state. In the view which I have taken, it is impossible for me to deal with the second question in the way in which it has been treated in the Court of Common Pleas and in the Exchequer Chamber. If I had been of opinion that the acts of the respondent conferred upon the appellant the power of interfering, for however short a time, with the right of the respondent, I should have been compelled, as a consequence, to hold that the obstruction could not be rendered temporary by any subsequent act of the respondent, because a right once lost can never be revived. But it is unnecessary



to dwell upon this point, because it is obvious that after the decision of this case, the question can never again be raised. I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed."

This case deals so fully and so exhaustively with the matter, that further comment is unnecessary; and we now come to *item 2*. The most modern case is the *National Provincial Plate Glass Insurance Company v. The Prudential Assurance Company*. This case is not touched upon by any of the books on this subject, for the simple reason that it is subsequent to their issue.

In this case the National Provincial Plate Glass Insurance Company, the plaintiffs, occupied and held for long terms of years No. 66, Ludgate Hill; and the Prudential Assurance Company, the defendants, were owners of buildings to the east and to the north of the building held by the plaintiffs. In 1870 the plaintiffs rebuilt their premises. They set back the upper floors of the east face of their building about 5 ft. 8 in., the plane of the face of the new building being parallel to that of the old building, and the windows in the new building nearly corresponding with those in the old building. A room on the ground floor of the old building was lighted by a dormer window of three faces, light to which came from an opening or well-hole between the building of the plaintiffs and that of the defendants. The ground floor of the new building was the same as in the old building, but instead of the dormer window, the plaintiffs put a skylight, partially co-extensive with the old window, though of a different shape, and this alteration was made in order to comply with certain provisions of the Metropolitan Building Acts.

In 1876 the defendants began to rebuild their premises, and had partially rebuilt them, when the plaintiffs brought this action, alleging that access of light to the windows on the east face of their building, and to the room on the ground floor, was already obstructed by what had been built, and

that the erection of the new building to the height proposed would be an invasion of the plaintiffs' right to access of light, and most prejudicial to the enjoyment of their premises; and the plaintiffs claimed an injunction and damages.

On the 23rd of June, 1876, the Master of the Rolls refused to grant an injunction on an interlocutory application.

Although the Master of the Rolls' decision was not final, and I propose after giving the judgment at the trial, it is so valuable, and the weight of his (Sir George Jessel) opinion so great, that I feel bound to give his judgment in his own words:—

“The first point to be decided is a question of law as regards those windows, which are not in the same plane as the old windows, but are further back in a parallel plane. Are those windows protected absolutely? In my opinion they are not. So far as I am aware, there is no decision exactly on the question, and therefore I am bound to give my opinion. I do not mean to say that I should have been of the same opinion if the difference had been a few inches, or a few minutes of a degree, or perhaps a degree. I think the old maxim *de minimis non curat lex*, would apply to these cases as to all others. But when the building is substantially a new house, placed at a very considerable distance from the old house, of a different shape, and, in my opinion, a new house substantially, I think I cannot say that the access and use of light has been enjoyed with that house, though it may have been enjoyed with an ancient house which stood in a different position. I do not forget that, in the case of *Tapling v. Jones*, Lord Westbury read the section as if instead of the words ‘access of light,’ there was the word ‘windows,’ and as if the enactment was, ‘When any window of a dwelling-house shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right to such window shall be deemed absolute and indefeasible.’ In the present case the windows are not the same, nor is it the same dwelling-house.

"I agree that if the plaintiffs had rebuilt the house and put the windows in the same positions, it would for this purpose have been the same house. But where they had built a new house in a different position, a considerable distance from the old house, and have put new windows into it, the mere fact that those windows are in a parallel plane at a greater distance, or in diagonal planes at a similar distance, does not make them the same windows within the Act. I think, therefore, that whether the plaintiffs can or cannot now restore the house or the windows, the windows are not at present within the provisions of the Act.

"I now come to consider the skylight. I am not prepared to say that the case of the skylight is by any means so clear. It is to be observed that, subject to the question of enlargement, the decision in *Tapling v. Jones* is not decisive on the question. The aperture by which the light is admitted through the ceiling of the room on the ground floor is in the same place as the old aperture, and the room is the same, so that we have for that purpose not altogether a new dwelling-house, and I am not prepared to say that if the aperture remains the same, the mere fact that the old aperture was covered by glass in a different direction ought to affect the question of access of light. If, for instance, there was a square aperture in the side of the room, which was covered over by a projecting shield, and was a window in the sense that there were sides to the shield as well as a front, so that it was not a flat series of panes of glass, but a bow, and the bow was removed and replaced by flat glass, I for one should not hold that the right to access of light through the old aperture was thereby lost. Similar considerations appear to me to apply to the case of taking away a top skylight, with lights either by lateral or diagonal planes, or by a combination of the two, provided that the aperture which admitted the light remains unaltered, and the only claim is to access of light by that aperture; that, I think, may still be called the same window.

"The next question is, whether the mere enlargement will

be sufficient to destroy the right; but it was decided in *Chandler v. Thompson*, before *Tapling v. Jones*, that there might be an action for nuisance by obstruction to an ancient window although the window had been enlarged. That was the decision of Mr. Justice Le Blanc, and though it may be considered as overruled by *Renshaw v. Bean*, yet that again was overruled by *Tapling v. Jones*, in which it was held to be not necessary actually to restore the window if the old window substantially remained.

“But still there remains the question whether, though you have left the room unaltered, if you alter the access of light to that room, you can say that the access of light is still enjoyed with the dwelling-house, workshop, or other building. That is a serious question, depending upon whether there has been such a substantial change in the building as will amount to an abandonment of the right. In this particular instance, so far as the evidence at present goes, it appears to me that there is no evidence of such a change.

“The alteration of the skylight was made, not with the intention of altering the access of light, but to comply with the regulations of the Building Acts. Therefore, as far as the evidence goes, it appears to me that there has been no alteration with any intention of abandonment of right; and I am not prepared to say that if, in altering other parts of the house, some of the ancient rooms with their ancient windows are kept intact, there is not an access of light to a building within the meaning of the third section of the Act, although it may not be access of light to the whole dwelling, because other parts have been altered. It seems to me, therefore, that as far as the skylight is concerned, and without pledging myself to that as the final decision, this skylight would be protected as being substantially the old aperture, and as not being a light abandoned when the house was reconstructed.

“Then it may be said, Why do I not grant an injunction? I have already said that I think material injury to that light

has taken place, but I am not prepared to say that the carrying up of the building to a greater height at the same angle will materially interfere with it. But that is not my only reason. It must not be forgotten that there are other considerations which may weigh with the Court at the hearing. In the first place, there was an absolute power given to the Court by the 21 & 22 Vict. c. 27, s. 2, in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages in addition to or in substitution for such injunction. It must not be forgotten that Vice-Chancellor Kindersley, in *Curriers' Company v. Corbett*, in dealing with the provisions of that statute, said that the fact of the building being completed before the injunction was asked for, gave rise to a question whether an injunction ought to be granted. I myself have said so in more than one case before me. That applies to the actual obstruction caused by the present building as it now stands. There is another consideration which ought to have weight, as stated by that learned Vice-Chancellor, and that is the comparative injury caused in point of value and damage to each party as regards the removing the obstruction, that is, by destroying the new building with a view to restore the enjoyment of light. It appears to me that the injury to the defendants will be out of all comparison to the injury to the plaintiffs as regards the obstruction to that skylight and to the room on the ground floor.

"Upon these grounds, quite independently of the question of law, as at present advised, and though I think the plaintiffs right as regards the skylight, I should hesitate long before I ordered the destruction of this new building, or its being removed for the sake of preventing injury to the plaintiffs' light. I have not heard the case out, and I do not know of what material importance this room may be to the plaintiffs, or to what extent any injury to their light may be remedied by artificial light or otherwise, which I

shall probably learn at the hearing. But, having regard to all the circumstances, I think, the defendants giving an undertaking to pull down anything they may build, the right thing will be to make no further order on the motion, except that the costs be costs in the action."

Such being the decision, it will be seen that the matter was left to be decided at the trial, the defendants having power to go on with their building, but being liable to be required to pull it down if so ordered.

"The action came on for trial on the 12th July, 1877.

"The arguments advanced for the plaintiffs were that the change of plane of the windows cannot affect the right of access to light, and the dominant tenement has a right to as much light as would pass through the projection of the old window on the plane of the new window. If it was not so, the smallest alteration in the plane of a window in rebuilding would destroy the right. The plaintiffs have a right to as much light as passed over the old buildings of the defendants into the old window of the plaintiffs, and the change does not destroy that right; the cases cited being *Luttrell's Case*, *Baxendale v. McMurray*, *Wood v. Saunders*, *Hale v. Oldroyd*.

"The arguments advanced for the defendants were that there is no such thing as property in light, and the plaintiffs cannot say they have a right to certain specific rays. If so, they would have a right to preserve light passing through an internal window, but no such claim has ever been thought of. They have chosen to alter their window entirely, and have abandoned what rights they had: *Blanchard v. Bridges*. They have a right only to the light as it passed through the original aperture. No doubt the fiction of a presumed grant is done away with by the statute 2 & 3 Will. 4, c. 71, s. 3, but the same principles still apply. *Renshaw v. Bean* was a departure from the old principle: *Jackson v. Duke of Newcastle*; *Tapling v. Jones*. The plaintiffs have chosen to alter their window, and to make it impossible for the Court to say

what was the effect of the alteration, and they must take the consequences. At all events, there can be no injunction granted, and the plaintiffs can have only damages: *Smith v. Smith*; *Staight v. Burn*; *Kelk v. Pearson*; *Isenberg v. East India House Estate Company*. The light they had before was very small, and we have taken away but a small part of that, not as in *Dyers' Company v. King*. Moreover, the wall of which they complain was built before the action was begun, and they can, therefore, have only damages at the utmost."

The judgment of the Court was that it had not been shown "that the access of light to the east windows would be affected, and that the building of a certain bow window would not affect the access of light to the ground floor, but that the raising of the party wall had affected the access of light to the ground floor," and continued in these words:—

"The case, therefore, resolves itself into a question as to the effect of the party wall upon the window on the ground floor, with regard to which various points have been suggested in argument. In the first place, it is said that the change which the plaintiffs have themselves effected in the mode of lighting their ground floor deprives them of any right under the statute. It is said that the aperture must be the same, or, to use the proposition put forward by Mr. Cookson, it must be the same in every respect, except extension in the same plane as the original window, that concession being necessary in consequence of the decision in *Tapling v. Jones*.

"Now, the words of the statute which regulate this matter (2 & 3 Will. 4, c. 71, s. 3) are, 'That when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible.'

"I understood it to have been suggested in argument that the house must be the same; but if that argument be urged, I am prepared to hold that it is not tenable, and that the

house need not be identical in every respect. We are not to be involved in those delicate questions of identity of structure which puzzled the Athenians with regard to their sacred trireme, or which are said to have been raised with regard to a knife. It is enough, as it seems to me, if the house be for practical purposes the same house, and this house standing upon the old foundations is, in my opinion, the same house, if it be necessary that the house shall be the same in order to bring the case within the statute. But I am not convinced even of that. In my view, the conversion of a dwelling-house into a workshop or other building would not deprive the workshop or other building of its right to the access of light which the dwelling-house had enjoyed. However, the point does not appear to me necessary for decision in the present case.

“The next question which arises on the statute is this: It is said that the access of light to the dwelling-house must be identical, and that the right claimed and the enjoyment which has existed must be of access of light through identical apertures. Now, in its breadth, that proposition is not true, because the case of *Tapling v. Jones* has shown that you may destroy the identical aperture, by taking away the surrounding lines of that aperture, and yet leave your right to light intact. Furthermore, I find nothing whatever in the statute which refers expressly to a window or aperture. I find in the statute a reference to the access of light; and in my view the access of light might be described as being the freedom with which light may pass through a certain space over the servient tenement; and it appears to me that, wherever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through that space, a right arises to have that space left free so long as the light passing through it is used for or by the dominant tenement. I come to that conclusion for this reason—that you do not want a statute to give you a right of access, in your own



premises, to light through your own aperture. The statute is wanted to assure your right in the space over the servient tenement.

“But then it is said that the cases have to a large extent proceeded upon the form and size of the aperture or window; and that is perfectly true, because, of course, the opening in the dominant tenement is the limit which defines the boundaries of the space over the servient tenement. It is for that reason that in all cases the Court has had regard to the aperture in the dominant tenement by means of which the space over the servient tenement has been useful to the dominant tenement. It is said that that conclusion is inconsistent with the definition given by Lord Westbury in *Tapling v. Jones*, but in my opinion that is not so; and Lord Westbury, in referring to a window as equivalent to an access, only means that the window in effect defines the access. And that that was the view taken by the House of Lords seems to me confirmed by a passage in the judgment of Lord Chelmsford, in which he says: ‘By the Prescription Act then, after twenty years’ user of the lights, the owner of them acquires an absolute and indefeasible right, which so far restricts the adjoining owner in the use of his own property that he can do nothing upon his premises which may have the effect of obstructing them. The right thus acquired must necessarily be confined to the exact dimensions of the opening through which the access of light and air has been permitted.’ In other words, he seems to me to say that the aperture through which the access of light has been admitted is the measure of the access which is to be enjoyed over the servient tenement.

“This case seems to me to illustrate the propriety of not introducing into the construction of the statute any questions with regard to aperture, opening, or window, except so far as the statute itself introduces them. For instance, in the present case no less than three openings have been suggested as being the decisive or dominant openings to which regard

must be had. In the first place, there is a suggestion, which I believe I threw out, that the interstice between the sides of the wall and the overhanging top and bottom where the dormer was situated, might itself be the opening, because I conceive there can be no doubt that by a grant of the house that space would pass, and you have therefore a confined opening from the adjoining premises into what in law is the plaintiffs' house. The second, which is that on which the plaintiffs mainly relied, was that the dormer window, consisting of glass arranged in three distinct planes, was itself the aperture to which regard must be had. The Master of the Rolls, in his judgment on the interlocutory application, seems to have been inclined to a third view, that the aperture to which you must have regard was the opening in the ceiling in the plaintiffs' room through which the light found its way from the dormer into the plaintiffs' room. But it seems to me not necessary to determine any of these questions. If that dormer window had for twenty years received light passing through a space over the defendants' premises, any aperture which the plaintiffs may be minded to use, and which lets in any portion of the light passing through that same space, is protected by the Act—it is the same access to the same dwelling-house. When you have those circumstances it seems to me you have all that the Act requires.

“But then it is said that the case of *Blanchard v. Bridges* is an authority for the proposition that a change in the plane of the window puts an end to the right under the statute, although a change of the aperture by expansion in the same plane would not put an end to that light. Now, such a conclusion seems to me one to which the Courts ought not to come, if they can help it. I am at a loss to see why putting back a window which has enjoyed light for twenty years, supposing the planes of the windows to be parallel, should effect an absolute surrender of the right which but for the putting back would have existed. Such a conclusion seems to me to have no reason or common sense to support it. And

if putting back in a parallel plane will not work a forfeiture of the right, why does putting back the front at an angle with the original plane do so? I confess that I see no reason for the proposition. However, it is said that *Blanchard v. Bridges* is an authority to bind me, whether I see or do not see the reason for it. That case appears to me to have proceeded upon this: there was that which the Court held amounted to an implied grant of a right to have certain windows, and an implied licence or covenant not to obstruct the access of light to those windows; and the whole question was, what was the extent to which that implied grant, licence, or covenant went? The facts were shortly these: The plaintiff had been allowed to erect windows looking east in his building or cottage; he then built out a projection 5 feet from the original house, two bays looking north and south, and also more or less east, and the question was whether the original grant, licence, or covenant, was to be deemed to protect these new windows. The Court held it was not. It was a mere question how far the implied grant, licence, or covenant was to be deemed to have gone. The Court says that a person might well acquiesce in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, but that to hold him to be thereby concluded as to some other window to which he might have the greatest objection, and to which he would never have assented if it had come in the first instance, would be a great hardship. Therefore I do not think that case to be a binding authority for the purpose for which it has been used before me; and I hold, in the present case, that there has been for twenty years an access of light to the plaintiffs' dwelling-house through a portion of space over the defendants' tenement, which reached the ground floor of the plaintiffs' house, and a portion of which, if not the whole, still reaches the same tenement of the plaintiffs' through an aperture. I have said that it does not appear to me to be necessary to determine whether the aperture be or be not the same. Further than

that, if I am wrong in the conclusion that the aperture need not be the same, I yet think that in this case I ought to hold that as to so much of the new aperture as does let through the old light, it ought to be deemed the same aperture.

“That being so, I next come to the material question, whether the defendants by their building have or have not stopped so much of the light which I have held to be privileged, as materially to affect the beneficial enjoyment of the plaintiffs’ premises, and so to entitle the plaintiffs to a substantial or considerable sum by way of damages. The defendants have asked my attention to several points bearing upon this question. They have said, and said truly, that the privileged light is only a portion of the light which now finds its way through the entire skylight.

“[His lordship then stated that on the evidence he had come to the conclusion that the raising of the party wall in very close proximity to the privileged part of the skylight had diminished the very small amount of light which previously came into the room, and that considerable damages ought to be awarded in respect of that interception of the privileged light. Then came the question whether an injunction ought to be granted, or damages ought to be awarded in lieu of an injunction, and in his lordship’s opinion there had been such delay on the part of the plaintiffs in asserting their right as might not of itself be fatal to their obtaining an injunction, but must be considered. His lordship then continued :—]

“Beyond that I must consider what the Master of the Rolls has called the materiality of the injury done to the plaintiffs. Now, by that expression the Master of the Rolls, in *Smith v. Smith*, meant something more than a question of whether there was a material injury which would give him jurisdiction to grant an injunction, because if there were not that material injury no question could arise between injunction and damages as alternatives. Having regard, then, to the materiality of

the injury here, I think it is not very serious. I think that a dark room will be made a little darker, in fact so much darker that damages would have been given to the extent of 100*l.* or 200*l.*, or possibly even more; but that the damage will not be such as to affect seriously the occupation of the plaintiffs' house by the plaintiffs. Further than that, I think I am at liberty to have regard to the whole scheme of the defendants, and I find that this injury done to the plaintiffs is done by an integral part of a very important building scheme, the other part of which will not result in damage to the plaintiffs. I am also of opinion that a portion of the defendants' building scheme actually enures to the benefit of the plaintiffs, because the substitution of a building to the north-east of the plaintiffs' for the screen, which was nearer to them, actually conferred a benefit on the plaintiffs. Now, although I am not at liberty to hold the injury compensated for by the benefit, yet in deciding the question of damages or of injunction, I am at liberty to consider it as one element which has to influence my discretion in deciding which of the two alternatives, injunction or damages, I shall adopt.

"Considering then, as I said, the course which the plaintiffs have pursued, and the general circumstances of the case, including the nature of the defendants' building scheme and the materiality of the injury done to the plaintiffs, I think myself at liberty to refuse, and I think that I shall do that which is most right between the parties by refusing, a mandatory injunction, and by assessing damages in lieu of it; and accordingly I assess the damages at the sum of 200*l.*

"Then arises the question with regard to costs. As a general rule, from which I believe I have as yet only departed in one case, costs should follow the event. But in this case I am not at liberty to exclude from consideration the fact that the plaintiffs have put their case far too high. Whether they, by their original claim, claimed relief in respect of the structure to the north-east is not perhaps very apparent on the pleadings, but the plaintiffs have taken that view, because

they have opened that case at the bar. With regard to that and the bay, I think the plaintiffs were wrong in their contention. I think that it is far from certain that if the plaintiffs had confined their case to that which was, in my opinion, the true case in respect to which they had rights against the defendants, the litigation might not have taken a very different turn. I think, therefore, it is a case in which the plaintiffs themselves have put their rights so high, and failed to so large an extent that I am justified, although giving judgment for damages in the manner I have done, to say that that judgment shall be without costs, and I do so accordingly."

*As to item 3.* It has been held that the advancement of a wall in which ancient lights are situated will not lose the right of light, provided substantial portions of the old windows are included in the new apertures, and the fact that a wall is moved back or advanced, does not *per se* alter the right, although by either operation the right may be lost if, after the building has been moved the light which formerly flowed into the old apertures cannot come in at the new.

I was engaged in this case and need not give the decision of Mr. Justice North, as the case went to appeal, and I quote from the *Times* reports of 9th February this year, as the Law Reports are not yet issued.

The case is very important, and is likely to be the *guiding* case for some years, having been carried, as I mention, to the Court of Appeal, I therefore give *in extenso* the report and advise its careful study.

*Court of Appeal*—COTTON, BOWEN AND FRY, L.J.J., Feb. 9, 1886.

*Scott v. Pape.*

Easement—Ancient Lights—Re-building—Advancement of Wall.

Where an old building has been pulled down and a new one erected, an easement of ancient lights will be preserved if a substantial portion of the old windows is included in

the new apertures, and the fact that a frontage wall is moved back or advanced does not *per se* alter the right, although by either operation the right may be lost if after the building has been moved the light which formerly flowed into the old apertures cannot come in at the new.

This was an appeal from an order of Mr. Justice North restraining the defendant from an interference with the access of light claimed by the plaintiff in respect of certain buildings on the west side of Denton Yard, Newcastle-upon-Tyne. It appeared that in 1872 the plaintiff pulled down certain old buildings, consisting of an erection of three stories in height, towards the north, and of another erection, two stories high, facing Denton Yard, which was a narrow lane 7 feet 5 inches wide at the southern, and 5 feet 7 inches at the northern end. New buildings were erected by the plaintiff on the site, which were of a totally different character and of a greater elevation, and were lighted on the east side facing Denton Yard by larger and more numerous windows. The east wall of the new building was also advanced so as to reduce the width of Denton Yard to a uniform measurement of 4 feet. When the plaintiff's old buildings were pulled down no formal record was preserved of the exact position of the old windows, but it had been since ascertained that the ancient lights of the larger of the plaintiff's old buildings were found to correspond very slightly, if at all, with the new windows. In 1883 the defendant pulled down four old buildings of low elevation, which belonged to him and fronted on the east side of Denton Yard immediately opposite to plaintiff's new buildings, and began to erect houses of greater elevation on the site, the effect being to interfere with and threaten the access of light to the windows on the east side of the plaintiff's new buildings. In restraint of this interference with such parts of the plaintiff's lights on the middle floor as corresponded with his ancient lights the present action was brought. Mr. Justice North, when the case was before him in May and June last, granted an in-

junction, being of opinion that the plaintiff's existing lights were a substantial continuation of his ancient lights, and that there had been no abandonment, and also that the advancement of the frontage line of the plaintiff's new buildings did not destroy the prescriptive easement of light which had been enjoyed by the plaintiff for more than 20 years before the alteration of his buildings. From this decision the defendant now appealed.

Mr. William Barber, Q.C., and Mr. John Chester appeared in support of the appeal; Mr. Rigby, Q.C., and Mr. Gainsford Bruce, Q.C. (Mr. Swinfen Eady with them), appeared for the respondent, the plaintiff.

LORD JUSTICE COTTON in his judgment said "that, so far as regarded those windows of the plaintiff's new building which occupied a substantial portion of the space occupied by the former windows, it was wrong to say that the plaintiff intended to abandon such rights as he formerly enjoyed in respect to such old windows, so long as a substantial portion of the old windows was included in the new apertures. Then with respect to the alteration of the line of frontage which had been advanced forward so as not to correspond with the old frontage line it had been contended that there had been so material an alteration by the plaintiff of the face of his building as not to preserve, but in effect to abandon, the easement enjoyed before the alteration. This was a question which depended upon the construction of section 3 of the Prescription Act (2 & 3 Will. 4, cap. 71). The *quantum* of light to which a man was entitled by prescription under the Act must depend upon the area of his windows and the distance they were from the servient buildings, and after the period of 20 years he got the statutory right to the access of light through that space of which he had been in the enjoyment for that period. The access of light depended upon the number of pencils of light coming to his windows directly or by refraction, and that right was not lost by the fact that a part only of the old windows was left in the new. The fact that the



frontage wall was moved back or advanced did not *per se* alter the right, although by either operation the right might be lost if, after the building had been moved, the light which formerly flowed into the old apertures could not come in at the new. The structure might be something so entirely different, or the alteration of the frontage line—by moving it back for a distance of 100 yards, for instance—might be such that practically and substantially no portion of the old light was enjoyed by the new windows. In his Lordship's opinion the question must be whether the alteration was of such a nature as to prevent the plaintiff from alleging that he was using through the new apertures the cone of light, or a substantial part of it, which reached the old windows. If that were established, then, although the right must be claimed in respect of the building, it might be claimed in respect of the apertures in the new building which occupied substantially the place of those in the former building. Having regard in this case to the small advance in the line of frontage, though not small, having regard to the width of the lane in which the building was situated, the Court ought not to hold that a substantial portion of the old light did not flow through the new openings. In his opinion the decision of Mr. Justice North was right, and the appeal must be dismissed, with costs."

LORDS JUSTICES BOWEN and FRY also gave judgment to the same effect.

Solicitors—Crossman, Crossman, & Co., for Stanton and Atkinson, Newcastle-upon-Tyne; Bonner, Wright, & Co., for L. C. Ridley, Newcastle-upon-Tyne.

*As to item 4.* I can only find decisions in favour. The cases are *Roberts v. Macord* (1 Mood. & Rob. 230), and *Potts v. Smith* (6 L. R., Eq. 311). In the latter case, Vice-Chancellor Malins said, "There can be no prescription for light and air over open ground, because the prescription for ancient light is a thing of limited extent."

From these decisions the surveyor, therefore, may confi-

dently advise his client (it would appear), if he is the dominant owner and has no buildings on his land, that he can have no claim to ancient light from the servient owner. Of course, if acting for the servient owner, he will advise him that he may put up any buildings on his land he may like, without fear of successful legal interference by the dominant owner.

The law being thus clear that there can be no easement of light for garden purposes, nor for timber-yards or saw-pits, my reader will see the importance, where old buildings are removed, if he is acting for the dominant owner, to take care before their demolition (1) to have carefully prepared drawings showing the ancient lights; (2) to take care that the new buildings are erected before the expiry of the time after which they would cease to be ancient lights.

*As to item 5.* This is important; for, suppose the dominant owner to have windows overlooking the servient owner's premises, and which have enjoyed light for, say, sixteen years, and he takes on a yearly or other tenancy the servient owner's premises, the time will *cease to run* during all the time he holds the two premises in his occupation, the easement being suspended, and directly he surrenders the adjacent premises the easement will be revived. This method of jeopardising the time necessary to acquire an ancient light may be serious.

*Item 6* sets out another method of estopping the running of the time, which is by purchasing the adjacent servient owner's premises. The law says, "Where the easement has been acquired, a subsequent union of the ownership of dominant and servient tenements does not extinguish the easement, but merely suspends it during all the time the union of ownership continues, the revival of the easement taking place on the severance." The case which I think is most recent, and is to be relied on, is *Simper v. Foley*, where the dominant owner had an easement of light over some cottages for twenty years. The dominant owner was the tenant of the premises, and his landlord purchased the adjoining

cottages in the year 1837, and sold them in the year 1860, the ownership being united from 1837 until such sale in 1860. It was in this case held that the easement was suspended, and that it revived in 1860.

I also quote a case from the *Times* of September 28, 1877, bearing on this point:—

“*Evans v. Moss*.—This was a motion for an injunction to restrain the defendants from interfering with the plaintiff's ancient lights. The parties occupied adjoining houses—Nos. 133 and 135, Curtain Road, Shoreditch—and on a previous occasion his lordship had intimated his opinion that he had no doubt as to the injury, the case only standing over for the argument of a point of law whether the plaintiff's easement had not been extinguished by unity of seisin in 1869. It appeared that in that year both houses had been sold at the ‘Mart’ by the executors of a Mr. Thomas James, and that one house had been conveyed to a Mr. Saul Moss on the 3rd of December, 1869, and the other to a Mr. James Samuel Spence on the 3rd of February, 1870, by the same persons. It was not contended that the two houses had ever been in the same occupation, different tenants always renting them.

“Mr. Marten, Q.C., and Mr. Oswald, for the plaintiff, accordingly now argued the legal question at some length.

“Mr. Fischer, Q.C., and Mr. Hatfield Greene, for the defendants, submitted that the matter could not be decided on the present application, and that, seeing the difficulty of the point of law involved, the motion must stand over to the hearing.

“Mr. Justice Lopes considered that it was not a case to be decided on the interlocutory application. He did not desire to express any opinion on the point of law, which was, however, of some nicety. The motion would stand over to the hearing, on the defendants giving an undertaking to deal with their buildings in any way the Court might then direct.”

It will naturally occur to my readers to inquire: If the dominant and servient owners' premises are both held from the same ground landlord, can any ancient light be obtained by such tenants or lessees? Yes, there can. The case in point is well known. Both premises were held by lease from the same landlord, the Duke of Portland. In 1857 the servient owner built a conservatory, obstructing the dominant owner's windows, to which he had had light for upwards of twenty years. It was held that the fact of the premises both being held from the same ground landlord did not affect the question; and the servient owner, therefore, had no right to obstruct the light.

Having treated very fully of how the right of light may be jeopardised, we have next to consider, in Table V., how it may be lost.

TABLE V.

*How ancient lights can cease to be such.*

1. By servient owner obstructing for one year.
2. By agreement between the dominant and servient owners, or express release.
3. By abandonment.

We have shown how right to light and air is acquired under the Act of 2 & 3 Will. 4, c. 71, but that Act is silent as to how that right may be extinguished; we have, therefore, only the decisions of the Courts in specific cases to guide us. Latham, in his work, lays it down "that the modes of the loss of window-light correspond to its acquisition." But this will not help us much when we have to consider *item 3* in the above Table, for we shall find that a loss of ancient light may arise in less than twenty years, if, from the circumstances of the case, an intention to abandon can be shown, while in the case of the acquisition of light no intention of any kind operates.

*As to item 1.* Undoubtedly the easiest way for the servient owner to rid himself of that most objectionable position of

having to give his neighbour light without fee or reward, is to block up the opening for twelve months. Now, should the dominant owner not discover this obstruction for twelve months, his ancient light is lost. It may be asked, Is it likely that an owner can have his windows obstructed for twelve months without his knowledge? But I think my reader will see that this might easily happen, by the house being empty for that period, and the letting being intrusted to a negligent agent; or being occupied by a tenant too careless to inform the owner, or, as sometimes happens, not being on friendly terms with the landlord, purposely omitting to mention the circumstance; and, lastly, by bribery or collusion (if undiscovered).

NOTE.—The practical method of blocking out a window is, of course, known to all surveyors. The only point I need call attention to is that the surveyor should take care the obstruction he puts up is sufficiently large to really obstruct all light, and this obstruction should during the year be daily watched, and a record kept, as the dominant owner may contend the obstruction was not for one entire year, and in such cases it will be necessary to produce proof.

*As to item 2.* This needs little explanation. The parties entitled, as they can create the right by express grant, so can they by express release get rid of the right. It would also appear that a mere agreement between the parties is equally binding.

*As to item 3:* Loss by abandonment. This is more complicated. It would appear that to lose the light by blocking up the opening, the window must have been so blocked up that no light came through it for the period of twenty years.

Lord Ellenborough's dictum is still the law: "When a window has been shut up for twenty years the case stands as though it had never existed."

While you are, therefore, absolutely certain that such a window is abandoned, there are pitfalls in waiting for you as to some other supposed abandonments.

In the case of *Liggins v. Inge*, it was held that where it could be collected from the circumstances of the case that there was an intention to abandon the right, it was not at all necessary that twenty years need run.

How difficult it must sometimes be to know the intention; and therefore how likely the adjoining owner may be deceived, and consequently involved in litigation!

The celebrated case on this point, which was argued in the Court of Queen's Bench, is as follows (*Moore v. Rawson*):—The plaintiff had a house, adjoining which was a shop which had ancient windows. Some seventeen years before the action, the occupier, who was also owner, pulled down the shop, and erected on the site a stable building with a blank wall, where formerly had been the wall with windows therein. Some long time after this, the defendant erected a new building. The plaintiff then opened a window in his stable wall just where his ancient lights had been, and afterwards commenced the action against the defendant, claiming these openings as ancient lights.

The judgment was in favour of the defendant, Justice Littledale remarking, "In this case I think that the owner of the plaintiff's premises abandoned his right to the ancient lights by erecting the blank wall, instead of that in which the ancient windows were; for he then indicated an intention never to resume that enjoyment of the light he once had. Under these circumstances, I think that the temporary disuse was a complete abandonment of the right."

Next, we will consider the case where it was held that, although the windows were blocked up, there was not an intention to abandon (*Stokoe v. Singers*). The facts were as follows:—The plaintiff's predecessor was owner of a house in which there were ancient windows. He blocked them up; but the appearance of the premises was such that it was obvious to a spectator from without, that there had formerly been windows, and it was disputed whether it would or would not appear that there were still windows

there. Nineteen years after this, the defendant, having become owner of the adjoining land, showed an intention of building on it in a manner which would prevent the plaintiff from ever again opening the blocked-up windows. The plaintiff thereupon opened the windows in order to assert his right. The defendant erected a hoarding on his own land so as to obstruct these windows, and for this obstruction the action was brought. Baron Martin told the jury that, assuming the right had existed, the question would arise whether it had ceased. He explained at considerable length that there were various ways in which the right might be lost. He stated that the right might be lost by an abandonment, and that closing the windows with the intention of never opening them again would be an abandonment destroying the right, but closing them for a mere temporary purpose would not be so. He also stated that, though the person entitled to the right might not really have abandoned his right, yet, if he manifested such an appearance of having abandoned it as to induce the owner of the adjoining land to alter his position in the reasonable belief that the right was abandoned, there would be a preclusion as against him from ever claiming the right. The jury found for the plaintiff. A rule for a new trial was allowed, on the ground of misdirection "in directing the jury to find for the plaintiff, unless they were satisfied that the lights referred to in the evidence had been closed with the intention of never opening them again." But the Court of Queen's Bench discharged the rule, saying, "Taking the whole summing-up together, it seems to us that the true points were left by the judge to the jury, and found for the plaintiff. We consider the jury to have found that the plaintiff's predecessor did not so close up his lights as to lead the defendant to incur expense or loss on the reasonable belief that they had been permanently abandoned, nor so as to manifest an intention of permanently abandoning the right of using them."

It will be a good guide, if my reader is in doubt as to any case he may have to deal with, to see how far it is on "all-fours" with the following judgment of the Court, delivered by Chief Justice Denman in making a rule absolute for a new trial on the ground of misdirection by Baron Platt, who, in a case of easement, had told the jury that a shorter period than twenty years would destroy a right:—"The learned judge appears to have proceeded on the ground that, as twenty years' user, in the absence of an express grant, would have been necessary for the acquisition of the right, so twenty years' cesser of the use, in the absence of any express release, was necessary for its loss; but we apprehend that as an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect, without any reference to time. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury. The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend upon all the accompanying circumstances."

We have now dealt, in PART I., with the "historical" aspect of the subject;—in PART II., with how the right is acquired; what injuries may be sustained, for which there is no legal remedy; what omissions on the part of the dominant owner will not interfere with his acquisition of right; how the right may be jeopardised; and, lastly, how the light may be lost. And we have tabularised these in five Tables, for easy reference. In the next part we have to consider how to estimate the injury.



## PART III.

TREATS OF THE VARIOUS METHODS OF ESTIMATING  
INJURY.

WE now approach the most difficult portion of our subject, and it will be necessary to point out the various methods that have been adopted for ascertaining the exact damage, because a work of this kind could not be considered complete if it did not contain the more prominent methods suggested for arriving at mathematical accuracy.

While, undoubtedly, my readers will be benefited by working out their calculations, I am bound to tell them that neither the method propounded by Professor Kerr, nor that of Mr. Homersham Cox, is accepted by the courts of justice.

Professor Kerr, speaking on the subject, after saying that by his method you could affirm that the obscuration is so much per cent. of the light formerly enjoyed, goes on to say, "But I am afraid, after all, that this does not help you in the courts of law. In the first place, they won't pay attention to mathematical calculations."

I think much is to be advanced why the courts of law should not; and in support of this I would instance the case of *Theed v. Debenham*. There the decision was based on the evidence that the low or under light was of exceptional value to the plaintiff, having, in fact, a different value to what, in ordinary cases, it would have. If the Courts had recognised the mathematical calculations, therefore an injustice would have been done to plaintiff; or, to put it more plainly, if mathematical calculation should be the guide, the

judges were wrong in their decision. Clearly, however, the decision was *in accordance* with common sense and justice.

The scheme propounded by Mr. Kerr for the measurement of lighting power is as follows:—A plan is made of the window, and, projecting from the centre thereof, a straight line, and from a distance along such line strikes a quarter circle, which quarter circle will finish against the wall of the house; he then divides this quarter circle, or quadrant, into four parts, stating as one of his reasons his desire to retain in his scheme the angle of  $45^\circ$ . I would here mention, to prevent any misapprehension, that this  $45^\circ$  is not recognised by the law; for in another part of this book my readers will see I have quoted the judges' dictum, setting out most absolutely that they cannot do so.

These four parts are called—*front*, this portion being directly in *front* of window; the next to it being called *front-diagonal*, the next to that the *side-diagonal*, and the next to that, which finishes against the wall, is called the *side*. The relative values of the lighting are given thus:—

Front .. .. .	61
Front-diagonal .. .. .	58
Side-diagonal .. .. .	53
Side .. .. .	18

But, having obtained these values, it is necessary, by this system, to obtain the value of the perpendicular light; and for this purpose a vertical section is next required, and a quadrant formed, having its base line projected at right angles to the wall, at the height of the centre of the window. Again, this quadrant is divided into four parts, called, and having the relative value, as follows:—

	The value of lighting power.
Vertical .. .. .	6
Vertical inclined .. .. .	$29\frac{1}{2}$
Horizontal inclined .. .. .	$47\frac{1}{2}$
Horizontal .. .. .	59

Having, then, these figures, the next process is to multiply these values into the values shown on the preceding list of plan values, and the result is the value of the hemisphere of lighting surface.

To find the quantity of injury, it is only necessary to form a diagram, and project thereon the obstruction.

Only two points seem to require to be mentioned. The first is the small value of the "vertical." This is explained to arise from the actual diminution of lighting surface comprised in this division, owing to the inclination of the vertical lines. The second is that the values mentioned are the values of the central part of each division, and that the value has an increasing or diminishing quantity, according as it approaches either a division of a smaller or higher lighting value.

I have pointed out the reasons why the courts will not accept this method, although so ingenious and clever.

Mr. Cox, barrister, published, in 1871, a second and revised edition of a work on this subject, with elaborate tables of calculations, showing the relative illuminating effects of every  $10^{\circ}$  of sky measured from the zenith; the obscuration by obstacles of uniform angular width and height, worked out from  $5^{\circ}$  of angular width and  $5^{\circ}$  of angular height, to  $90^{\circ}$  of angular width and  $90^{\circ}$  of angular height; again, the obscuration by parts of structures  $5^{\circ}$  in width, and a table of co-sines worked to four places of decimals. It is well worthy of study, but as in practice the system is not adopted, I make no further observation thereon.

I have now given a short outline of the mathematical methods which have been suggested, and which have been rejected as being too complicated and *not practical*.

In confirmation of the non-acceptance of any such theories, and to show the views entertained by our professional journals, I give the following extract from the *Architect* of November 13, 1875:—

"Is there no law on the subject? he asks. The answer is

that there is none except this in the abstract:—That every window which is twenty years old has its light protected by a certain Act of Parliament of the time of William the Fourth, against any sort of material interference that may be threatened by building operations on other land. But, he goes on to say, is there no standard set up whereby the designer of a house can govern himself? None; nothing but the personal opinion of a jury or a judge, and hitherto generally that of a judge alone, dealing with affidavits in Chancery. And what makes matters worse is that during the last twenty years the ordinary succession of Chancery judges has produced a succession of new principles of adjudication, so that all that can be done in the way of ascertaining a rule of judgment is to look up the latest precedents.”

And further to show the varying decisions of the judges, I quote from the *Builder* of January 26, 1878:—

“The practice, however, of granting injunctions to prevent the erection of buildings which may affect an ‘ancient’ light has only become comparatively common during the last ten or twelve years. Before 1866, the best of the Lord Chancellors took a broad view of the exigencies of commerce and the progress of improvement in towns. For more than thirty years after the passing of the Prescription Act, an ‘ancient’ light was regarded as too often an obstruction to improvement rather than as a fit object to obstruct improvement. The opinion expressed much more than a hundred years before, by Lord Chancellor Hardwicke, was tacitly endorsed—an opinion that though ‘it is true the value of the plaintiff’s house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground.’ Indeed, not long ago Lord Cranworth suggested in one case what a barrister, technically interested in the confused practice of ‘light and air,’ has called a very alarming doctrine, that dwellers in cities must submit to encroachments upon their ‘rights’ as to windows which dwellers in the country might feasibly claim. But by

the zeal of two Vice-Chancellors, in 1865-6 effect was successfully given to the statute which defined and established the prescriptive right to light. They granted injunctions which caused one Lord Justice to say that the Vice-Chancellors had gone too far. Through the efforts of the latter, however, the Court of Appeal was squeezed into seeing that such injunctions were necessary. Even Lord Cranworth consented to undo the effect of what he had previously said; but his adherence was given with a protest."

We now come to consider the matter, as all surveyors must do, with reference to the evidence we must submit to the judges, and the methods of calculation which now obtain; and, first of all, I have to disabuse my reader's mind that the angle of  $45^\circ$ , although by many considered a perfect test, is one not recognised by the law.

I quote from Mr. Locock Webb's (Q.C.) paper, read in 1878 before the Royal Institute of British Architects: "It may be useful, however, to make some few observations relating to the statutory law touching the angle of  $45^\circ$ . The Metropolitan Board of Works under statutory authority, prescribed, by a bye-law passed in 1856, in effect that every new street within the limits of the Metropolis must be of the width of 40 feet at the least; but if the building fronting any street be more than 40 feet high from the level of the street, then such street must be of a width equal at least to the height of every building above such level. And by the Metropolitan Local Management Act, 1862 (25 & 26 Vict., c. 102, s. 85), it was provided that 'No building, except a church or chapel, shall be erected on the side of any new street of a less width than 50 feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of the street, without the consent in writing of the Metropolitan Board of Works; nor shall the height of any building so erected be at any time subsequently increased so as to exceed such distance without such consent; and in determining the

height of such building the measurement shall be taken from the level of the centre of the street, immediately opposite the building, up to the parapet or eaves of such building.'

"Lord Selborne, in *The City of London Brewery Company v. Tennant*, after stating that, with regard to the  $45^{\circ}$ , there was no positive law upon that subject, and that the circumstance that  $45^{\circ}$  were left unobstructed was merely an element in the question of fact whether the access of light was unduly interfered with, held that there was 'undoubtedly ground for saying that if the Legislature, when making general regulations as to building, considered that when new buildings are erected, the light sufficient for the comfortable occupation of them will, as a general rule, be obtained if the buildings to be erected opposite to them have not a greater angular elevation than  $45^{\circ}$ , the fact that  $45^{\circ}$  of sky are left unobstructed may, under ordinary circumstances, be considered *prima facie* evidence that there is not likely to be material injury.'

"The question again came under consideration by the Master of the Rolls in *Hackett v. Baiss*. The plaintiff in that case was the owner of extensive messuages in Jewry Street, in the city of London, the owners and occupiers of which had uninterrupted enjoyment of light for above twenty years. The defendants were erecting a warehouse opposite to the plaintiff's premises, on the site of some old buildings, part of which only subtended an angle of  $38^{\circ}$ , and other part an angle of  $72^{\circ}$ , above the horizon at the centre point of the ground windows of the plaintiff's houses. The defendants desired to build their warehouse 52 feet high, and had it carried up to the height of 46 feet, which subtended an angle of more than  $45^{\circ}$  at the foot of the plaintiff's ancient lights, by about 1 foot or  $1\frac{1}{2}$  feet. His lordship said, 'The real question I have to decide is this: In a street a good deal narrower than ordinary streets, not being more than 38 feet 6 inches at any point across, and other parts only 34 feet, is

a building owner entitled to erect a building to a height which will obstruct the access of light below the 45° angle? I can say that, as a general rule, he is not. In cases of this kind, positive evidence being unobtainable because the building is not erected, you must go upon theory, and that theory, of course, must be the opinion of skilled persons—persons who have paid attention to the effect of buildings on light. But on this point the Court is not left to guess or to arrive at an arbitrary conclusion upon the evidence of witnesses, because, in the first place, the point has been considered by the Legislature; and after considering the result of professional opinions, the Legislature has adopted the angle of 45° as the proper angle, below which the incidence of light ought not to be permitted to fall, in the case of buildings on the opposite side of an ordinary street; and that view has been sanctioned by the Court, whose decisions are binding upon me if I differed from them, which I do not.' And after referring to *The City of London Brewery Company v. Tennant*, his lordship proceeded: 'So that on being satisfied that 45° are unobstructed, I ought, *primâ facie*, to come to that conclusion, unless there is something special in the case. Now, what is special in the case is in favour of the plaintiff. In the first place, as I have said, the street is rather narrower than it ought to be. The legislative rule applies to a street of the ordinary width. In the next place, there is some positive evidence that the present height of 46 feet, a little over 45°, has interfered with the access of light not to an inconsiderable extent, and has actually caused personal inconvenience to one of the occupiers of the houses. I do not say that that alone would be conclusive.

"I cordially assent, if any assent were necessary, which it is not, to the remarks made by Lord Cranworth in the case of *Yates v. Jack*. I think it is no answer to say, because for sampling in some business it is better that the direct rays of the sun should not enter into the room, that therefore you may deprive a man of the blessing and comfort of the entry

of the direct rays of the sun. If he does not like the sun entering when he is going to sample, he can pull down his blind, or otherwise regulate the access of light. There are other times of the day when his room would be more cheerful, more comfortable, and more enjoyable with the sunshine, especially in a city like London, where we do not see quite so much as we should like of the direct rays of the sun. That is no answer at all. It is not conclusive upon the point, and, so far as it goes, is in favour of the plaintiff. That being so, I shall grant an injunction.

“It is a very serious matter to decide what the terms of it ought to be. I have sent for the order in *Yates v. Jack*, which I have read. It is not necessary that the whole subject matter in dispute should be fought out in a most inconvenient or disagreeable form, upon a formal motion to commit the defendants for breach of the injunction. Nothing, in my opinion, can be more undesirable; but, at the same time, it is impossible for the Court to say beforehand what kind of building would obstruct the light. The defendants may wish to alter their plans, and if they do so wish, the Court, *à priori*, cannot say whether the plans when altered will or will not be objectionable to the plaintiff; therefore in that case the Court has no alternative. It has, therefore, been my habit to ask the defendant what form of injunction he prefers; and I believe in every case the answer has been the same as Mr. Chitty has given to-day, namely, that he prefers an order which tells him exactly what he is not to do. I will grant an injunction to restrain the defendants from erecting the new building at a greater height than 46 feet from the pavement or base line. This, however, is not to prevent the defendants making a sloping roof of a greater height, so long as the angle of incidence of light over the roof to the centre of the ground-floor windows of the plaintiff's house does not exceed 45°.”

How little the angle of 45° can be relied on I further illustrate, following the rule I have laid down to give *in extenso*



the most recent decisions. The case is the celebrated one of *Theed v. Debenham*. "The bill was filed on the 21st of September, 1875, by William Theed, sculptor, the lessee, for the unexpired residue of a term which had about six years to run, of several rooms or studios at the rear of No. 12, Henrietta Street, Cavendish Square, Middlesex, having a back entrance in a narrow street called Mill Hill Place, against William and Frank Debenham, partners, carrying on business as mercers at Nos. 27, 29, and 31, Wigmore Street, the back of whose premises also opened into, and was numbered 1 and 2, Mill Hill Place; and a notice of motion, dated the 24th of September, having been served on the defendants, was, by consent, ordered to stand till the 12th of October, on which day an injunction was granted on the usual terms of the plaintiff undertaking in damages.

"On the 2nd of November the bill was amended; and on the 10th of December was re-amended, and, as re-amended, was by William Theed and William Ford, the ground lessee for a term of which some thirty-five years were unexpired, under the Duke of Portland.

"The bill stated that the defendants intended to raise the height of Nos. 1 and 2 to a certain height above their present elevation; that if the defendants were allowed to do this, there would be a very substantial and material diminution of light to the said premises occupied by the plaintiff, William Theed; that in the course of the profession of the plaintiff William Theed as a sculptor, he required not only a direct light, but what is technically termed an under or low light, and which he had hitherto enjoyed; and the bill prayed that the defendants might be restrained from 'erecting or constructing, or allowing to be erected or constructed, any building at, upon, or instead of the said premises, Nos. 1 and 2, Mill Hill Place, and from altering the same premises, so as to darken, hinder, or obstruct the free access of light and air to the plaintiff's said premises on the opposite side of Mill Hill Place aforesaid, as such access was enjoyed by

means of ancient lights previously to the 20th day of September, 1875.'

"The defendants by their answer admitted that they were about to carry their buildings to the height stated in the bill, and they disputed the statements that there would be any substantial or material diminution of light to the plaintiff's premises, and that the plaintiff William Theed would be thereby prevented from carrying on his profession as a sculptor, or otherwise suffer any loss or injury.

"The issues of fact were supported on either side by a considerable body of evidence, and many of the witnesses were cross-examined in Court, with the results appearing in the judgment.

"A point of law was raised which turned upon the distance from each other and height of the respective buildings. It was admitted that the width of Mill Hill Place, from wall to wall, was 31 feet; the height of the defendants' old building, No. 1, was 29 feet 3 inches, and of No. 2, 31 feet, from the foot pavement to the parapet. The defendants intended to raise their new buildings so that their new parapet would be 38 feet from the pavement, and their new ridge of roof about 7 feet above the new parapet.

"The centre of Mr. Theed's studio window was about 13 feet above the pavement.

"The plaintiff's lights were all ancient, but their windows had been enlarged within twenty years from the filing of the bill.

"Sir H. Jackson, Q.C., and Byrne, for the plaintiffs. For the operations of sculpture a clear, uninterrupted, horizontal light is necessary; a vertical light is not sufficient. A north light is also preferable to any other.

"The eaves of the present building of the defendants are just as high as the width of the street, that is to say, Mr. Theed has an angle of 45°.

"An ancient light is to be protected, subject to this, that the Court will not interfere where the injury is trivial; it

will interfere only where there is substantial injury. The law is established by the following authorities: *Dent v. Auction Mart Company*; *Tapling v. Jones*; *Heath v. Bucknall*; *Aynesley v. Glover*.

"Kay, Q.C., Lumley Smith, and Borthwick for the defendants. Only a small portion of Mr. Theed's light is ancient. Mr. Theed can claim no more as a sculptor than an ordinary person can claim: *Yates v. Jack*. He cannot enlarge his right by using his premises, which were formerly a stable and coach-house, as a studio: *Kelk v. Pearson*.

"The right is to such an amount of light as is wanted for the comfortable use and enjoyment of the property: *City of London Brewery Company v. Tennant*.

"A covenant for quiet enjoyment accompanying a grant of lights conveys no greater or other right in equity than the covenantee would have at law: *Leech v. Schweder*.

"The doctrine of *Clarke v. Clarke*, supposed to have been exploded, has to a great extent been supported since: *Kelk v. Pearson*.

"The rule as to 45° was adopted by the Master of the Rolls in *Hackett v. Baiss*. We claim a right to build to 45°, measured, not from the street as a base line, but from a horizontal line drawn through the centre of Mr. Theed's studio window, which, as to part only, was one of the ancient lights.

"[In answer to an inquiry by the Court, it was stated that the statutory rule as to the angle of 45° is to be found in sect. 85 of the Metropolis Local Management Acts Amendment Act (25 & 26 Vict. c. 109), passed on the 7th August, 1862, and in a bye-law issued under Parliamentary authority by the Metropolitan Board of Works.]

"Vice-Chancellor Bacon, after stating the nature of the complaint made by the bill, and the defendants' assertion of their right to do what they were doing, continued:—

"It is not to be disputed that the plaintiff, Mr. Theed, for more than twenty years, has been in the enjoyment of

that light which existed up to the time when the defendants pulled down the buildings in Mill Hill Place, the two houses, and altered the third, which is at the corner of Welbeck Street.

“The plaintiff had acquired, therefore, a legal right to the enjoyment of that which for so many years he had possessed. That I conceive to be his property—property which no man has a right to take from him—that is to say, a property which this Court has frequently been called upon to protect, and has always protected, excluding only from such cases merely frivolous complaints on the part of the owner of such property—merely captious or unreasonable complaints—because in point of fact some interference has been practised, which, however, did not materially injure him, and of which he could not reasonably complain in a court of justice, however displeased he might have been at it. [His lordship then reviewed the evidence with the following result:—]

“I take it, therefore, that it has been proved that there will be, if the defendants’ buildings are carried up to the height they propose, a serious diminution of the light required by the plaintiff for the purposes he has mentioned, and which he has hitherto enjoyed; [and after further observations on the test which had been adopted, of raising a screen to the height of the proposed new building, and letting it suddenly fall, whereby, in the judgment of the Court, a very satisfactory illustration of the effect of the proposed change had been afforded, his lordship continued:—]

“Then, as to the contention which has been raised, which amounts to this, that in this country one man can say to another, ‘You have got more light than I think is good for you, therefore I will take some of it away,’ I apprehend that no case which has been referred to countenances any such suggestion. The evidence of one of the witnesses, Mr. Eales, is clear, distinct, and positive upon the subject. Mr. Eales has a notion that, if the light is not interfered with to the extent of more than an angle of 45°, the right to obscure

one's neighbour's light to that extent is a right which anybody may assert against the owner of any light which is already obscured to a lesser extent. He says in effect: 'I can raise this building to this height. My building obscured you to the extent of  $30^{\circ}$  only before: I will now obscure you to the extent of  $45^{\circ}$ ; that is enough light for you, and with that you must be content.' I hope I have not overstated it. I have endeavoured to use Mr. Earle's own expression, 'You must submit to it; it is enough; you had more than was good for you before.' That is no answer to the plaintiff's case. No case referred to countenances such a proposition.

"The regulation as to the angle of  $45^{\circ}$  is to be found, I believe, only in that provision of the Metropolis Local Management Act, in which the width of a street is spoken of, and which of itself, measuring the width of a street and the height of the house, furnishes an angle of  $45^{\circ}$ . That, be it observed, is from the street, as Mr. Kerr said, and if he had not said it, the Act of Parliament has said it; for the statute enacts that 'in determining the height of such building the measurement shall be taken from the level of the centre of the street;' and that must be so, because the position of the windows is so different in various buildings, that if you were to search for the point from which to measure your angle of  $45^{\circ}$ , it would be as various as the buildings to which it would be applied. It is said that the Master of the Rolls, on a recent occasion, in *Hackett v. Biass*, applied this rule about  $45^{\circ}$ . This, however, he did not do; on the contrary, he quoted the decision in *The City of London Brewery Company v. Tennant*, in which Lord Selborne said there is no positive rule of law on the subject. The regulation may be an illustration or guide, rule there is none. It is said that the Master of the Rolls applied that rule, and applied it by measuring through the middle of the window. No doubt the Master of the Rolls did what was suitable in the case before him, having regard to the arguments addressed to him, but that he laid down any rule of law I am by no means convinced, and I should

be very much surprised to find that that was his intention, when I find him at the same time referring to a decision which lays down that there is no rule on the subject. He was deciding what was right between the parties before him, but a positive legal rule he never in any respect laid down.

"This is really the whole of the case. The case, in my opinion, is proved on behalf of the plaintiff. He has proved a statutory right to the enjoyment of his light undiminished. It is proved, and, indeed, is confessed by the defendants, that if they build up to the height which Mr. Earles mentions in his deposition, the light will be greatly diminished. In my opinion, they have no more right to take away the light which the plaintiff has been enjoying, than they have a right to take away the front wall of his house.

"The case, in my opinion, is therefore very distinctly proved, and the plaintiffs are entitled to the injunction they ask for."

His lordship also gave the plaintiffs the costs of the suit.

It will be seen, from the perusal of this case, that the rule as to 45° was rejected by the Court. The ancient lights had a north aspect, in a narrow street, and Mr. Theed stated that in carrying on his work as a sculptor he required not only a direct light, but an *under* or *low light*.

Having now set out fully the various methods by which you cannot estimate the damage, nor obtain interlocutory, perpetual, or mandatory injunctions, we have to consider how we are to make our estimate, and for this purpose I set forth the matters necessary to be considered in the following Table:—

TABLE VI.

*Matters to be considered in estimating damage or injury to ancient light and air.*

1. Quantity of daylight lost.

This should be estimated at different periods of the year, because the value of light will differ. For example, take an office in the City. The loss of daylight in the summer, when probably it would be

after office hours, would be of little consequence; but the loss in winter, when it would occur during the office hours, and would thus necessitate the inconvenience and cost of gas, would of course have a different value.

2. The particular use for which light is required, having regard to the fact that, for certain trade purposes, no amount of gaslight can be a substitute for daylight.
3. If for all the time it has existed it has been used for the particular purpose; if not, for what other purpose.
4. How far the enjoyment of the premises is affected.
5. How far, by alterations of dominant owner's premises, the diminution of light may be avoided.

In case this can be effected, it will be necessary to make a careful estimate of the cost of these works, and the quantum of inconvenience they would occasion to dominant owner. This may be set out in the defence, and may influence the jury in assessing the damage; but it must be remembered in law the dominant owner cannot be required to alter his premises.

6. Whether the quantity of light and air is so far diminished as to render the room or premises unhealthy for occupation.
7. How far the injury to dominant owner's premises may be reduced by the use, in building servient owner's obstruction, of white glazed bricks, or facing it with white tiles or other material.

In using Table VI., it must be remembered that a material diminution of light is necessary to sustain a successful action. I may mention a recent case in Fleet Street, in which I was engaged for the defendants, in which I set forth in my affidavit "that no appreciable damage would be done by the new buildings." When the case came on for trial, the plaintiffs lost it, and had to pay all the costs.

The law appears to be that there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, or to prevent the plaintiff from carrying on his accustomed business on the premises, as he had formerly done.

To the experienced practitioner there is little difficulty in pronouncing a confident opinion, after a careful inspection of the premises or drawings, as to what amount of diminution of light will be considered sufficient by the judges to

justify an injunction, and what amount will justify the lesser stringent course of action for damages.

It may be well to set out here the legal opinion as to the different amounts of money injury which justify the different methods of procedure.

Sir George Jessel, whose decisions as Master of the Rolls command such universal respect, says that "whenever an action can be maintained at law, and really substantial damages, or perhaps I should say considerable damages (for some people may say that 20*l.* is substantial damages), can be recovered at law, then the injunction ought to follow in equity; generally, not universally, because I have something to add upon that subject;" and, further on, his lordship added, "If I had found by the evidence that there was in this case a clear instance of very slight damage to the plaintiff—that is, some 20*l.*, or 30*l.*, or 40*l.*, but still very slight—and a very large material substantial damage to the defendant, I should be disposed to hold that that was a case in which this Court would decline to interfere by injunction, having regard to the new power conferred upon me by Lord Cairns' Act to substitute damages for it." And in the still more recent case of *Kino v. Rudkin*, it was decided by Mr. Justice Fry that since the Judicature Act, as before it, a plaintiff in an action to restrain an alleged obstruction to ancient lights cannot obtain an injunction unless he proves substantial damages.

It will therefore be seen, as Mr. Locock Webb says, that "it is impossible to lay down any rule as to what would constitute sufficient damage upon which to ground an application. But the result of the authorities may be, I think, shortly stated thus: It is not every impediment to the access of light and air which will warrant the interference of the Court by way of injunction, or even entitle the party alleging himself to be injured, to damages. In order to found a title to relief in respect of such an impediment, some material or substantial injury must be esta-



blished, and the onus of proving this injury rests upon the plaintiff.

*As to item 1.* I have so fully gone into this question, I need say no more here than that I would advise the surveyor, in estimating the *quantum* of daylight, to free himself from "party ties," and look at the matter as a practical man. By such means will he be able to give his client what in the end must prove to be the best and soundest advice.

*As to item 2.* I recall a case I was a short time since engaged in, in which the value of a small window at the back of a large warehouse acquired exceptional importance, from the fact that the counter which stood beneath was used for sorting different coloured beads. This window was considered of little importance by the building (servient) owner, as he was aware that it was about 8 feet 6 inches from the floor of the room in which it stood. It was, however, contended by the dominant owner that in no other part of his extensive premises could this delicate process be carried on with the same convenience, and that the slightest diminution of light was of the first importance, because immediately it became so dark as to necessitate the use of gas the workmen had to cease work, as by gaslight different colours could not be distinguished. Another instance is the celebrated case which I have already quoted at full length, where the sculptor highly valued the *low* or *under* light, and successfully contended that such light was absolutely essential to him.

Next would I mention a case in which I was engaged for the plaintiff, where we obtained 500*l.* damages, and one of the items of the claim was that the dispensing could not be carried on with the same accuracy and rapidity as before.

*As to item 3.* It is wise to obtain this information, because it has been held that only the light is protected for the purpose for which it has been enjoyed. The ground of this has been that there can be no substantial injury, if a man can enjoy his premises for the same purposes as he has

hitherto enjoyed them. However, the more recent rulings appear to favour the dominant owner ; Vice-Chancellor Bacon saying, "In my opinion, they have no more right to take away the light which the plaintiff has been enjoying, than they have to take away the front wall of his house, and no man can be heard to say that he may obscure another's ancient light because he has more light than he requires." While, therefore, it may be contended that sufficient light is left for the purposes for which the premises have been used, the dominant owner may set out, and seek to justify, that the market value of his premises is diminished, because, though there is light enough left for present purposes, for others to which the premises could be well adapted there would not be sufficient.

*As to item 4.* It is well to bear in mind that Lord Justice James's dictum "was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house." Clearly, then, you must estimate how much, in each particular case, the comfortable occupation and enjoyment is affected.

*As to item 5.* While, as I have clearly shown, the dominant owner cannot be compelled to alter his premises, it may still be a great advantage to be able to show how it can be done, and the cost ; for in some cases I have been concerned in, on the dominant owner having it shown to him that such alterations could be effected, and my offering on behalf of my clients to do the necessary works, the matter has been arranged. It seems so fair to say, "I am sure you do not wish to injure your neighbour by preventing him making the most he can of his land, when by certain alterations, which will not cost you anything, your premises can be just as comfortably enjoyed." My experience is that it is the exception to find people determined to litigate, and that in the early stages a professional man, new to the matter, can often arrange differences in a satisfactory manner.

In the Table other reasons appear why it is desirable.

*As to item 6.* Where it can be shown that the premises are not merely injured as to enjoyment, but are rendered unhealthy, of course a much stronger case is presented. It is not often that such can be shown; still there have been cases where the "ventilation" has been affected by premises being built in, as it were, so that no rays of sun can reach the building, and little air. The most recent case of this kind was in Spital Square, where the dominant owner, a medical man, claimed heavy damages for loss of the sun's rays. This case is alluded to, and has diagrams to illustrate it, in Part IV. of this work.

*As to item 7.* Much stress is sometimes laid on the method of building with white glazed bricks, or facing with white glazed tiles, or the advantage of reflectors of various kinds. It is well, therefore, to consider these points, and to form an opinion of their value.

We next have to deal with those diagrams and calculations which, in opening evidence in these cases, I have produced before the Court, and which have the *merit* of obtaining its approval.

The first case is illustrated in Plate 1. This shows the case of *Twinberrow v. Braid*, tried in the month of July 1878. The view is taken with the eye 5 feet 3 inches from the ground, and the body moved back 1 foot from the window. It will be seen that the whole sky surface on the left hand of the picture is unobscured; on the right, uncoloured, is shown an existing obstruction of light; in the centre is another obstruction in the shape of a chimney-stack.

Now turn to Plate 2, and it will be seen that the sky on the left hand is completely hidden from view by the defendant's new buildings, which in this plate are shaded dark, and on the right hand is also a small obstruction of a chimney-stack, also shown in the dark tint. It will be seen that the chimney-stack in the centre is of a different form, and, I may mention here, the defendant's surveyors made much

in their affidavits of the advantage to plaintiffs of this alteration.

Now, if my reader will work out his calculation, I think he will see that the loss of sky is 60 per cent. It is so in the large drawings I produced in Court, but in the process of reducing some slight variation may occur, and it is perfectly immaterial, as the sole object in view is to show the method of calculation.

These plates show lateral obstruction. Next, we come to erection of buildings directly opposite dominant windows.

Plate 3 shows a building in a narrow street, with the quantity of sky it possessed. The servient owner pulled down the opposite premises, and rebuilt his premises to a greater altitude, as shown on Plate 4, thus diminishing the sky view by 90 per cent. The views in this case are taken from the first-floor window, with the eye at a height of 5 feet 3 inches from floor, and the body 1 foot from the window.

To show the same building from a different point of view, I have taken the view from the ground floor,—Plate 5 showing the view antecedent to the new building; Plate 6 showing the new building and the result—the total loss of sky.

The special object in giving these illustrations of injury in a narrow street, is to bring prominently before my reader what is so often contended by the opposite parties. By the dominant owner, that he has so little light that he cannot afford any decrease of it; that the slightest diminution is therefore to him a far greater injury, because he has so little. By the servient owner, that the premises are already so dark that a little more or less cannot practically make any difference; that the lighting of gas a few minutes earlier is of little consequence; that if, in the crowded thoroughfares of great cities, such slight injuries gave the right to injunction, the architectural improvements of the commercial towns will cease to be carried on.

Pray understand I offer no opinion on the merits of these contentions, nor in any portion of this book do I do so. My object is not to offer opinions, but to give facts, and thus render this work worthy of its title—A TEXT-BOOK.

The next obstruction we will, for distinction sake, call a *distant lateral*, as in this case it will be seen from the plan given in Plate 7 that a narrow roadway intervened, and it was contended that the greatest injury sustained was from the heightening of the buildings marked on the plan B, C.

In this case, it will be noticed, right opposite to the plaintiff's premises was a tall building, which is shown on the centre of the diagram in Plate 7, and marked D thereon; and on plan on the right is shown the old building and its height, marked A, B, C on diagram.

I allude to this case because a test of injury was tried of a practical character. To test whether the injunction should continue, it was suggested that a screen should be put up, with the power of raising it and lowering it at pleasure.

On the day appointed, I attended with the surveyors for the defendant, and the surveyors for the plaintiff were also present. We sat in various positions in the room on the ground floor which was stated to be most injured, one of the plaintiff's surveyors placing himself in a favourable position, with his back to the light and a newspaper in front of him. According to instructions, the screen was lowered without any notice, and raised in the same manner. The result of this test was the defendant gained the case with costs.

Another portion of the claim in this case was the loss of the sun's rays. The plaintiff, being a medical man, contended that the raising of A, B, C deprived him of the sun's rays, and rendered his house unhealthy. He further contended that as his practice necessitated his living in the immediate locality, and as he could not obtain any other house adapted to his requirements in the same neighbourhood, no money could compensate him, and therefore he

ought to have a perpetual injunction. A further ground for this was that his professional duties necessitated his residence therein all the year round, save only for one short fortnight. It will be seen, therefore, how strong was his claim to have a healthy house.

To prove that the buildings A, B, C did not obstruct the sun's rays, I visited the premises at different periods, and made diagrams, of which Plates 8 and 9 are reduced copies. I found that the morning sun had uninterrupted play on the front till ten o'clock in the morning on the days of my visit. I also found what I considered an important point to call the attention of the Court to—that the whole flank wall of plaintiff's house was in direct sunshine also. At 11.50 a.m. the shadow was thrown on the house as set forth in Plate 8; but this shadow was cast, not by the defendant's building, but by the old building marked D on plan, Plate 7. Plate 9 shows the shadow thrown on a different day at 11.25 a.m. Later in each day, in the different days, I attended to watch the building, but at no period was the plaintiff's statement confirmed of the shadow being thrown by the heightening of B, C.

Having dealt with front, side, or lateral and distant lateral obstruction, we next deal with *skylights*.

In Plate 10 I set out the view of sky taken in shop behind the dispensing counter, where light was admitted by both sides to be most important. I confess I had some difficulty in making the learned counsel, at the view before the trial, quite understand what the ellipse was, as the skylight was circular; but when he did, he fully realised the value of the diagram.

Plate 11 shows the same skylight, with the new buildings indicated thereon, thus showing a loss of sky of  $97\frac{1}{2}$  per cent. On the right of the plate I have shown the new buildings continued, and dormers which, although not visible from the point of sight, appear to have the effect of making the diagram more intelligible, and indicated a further obstruction beyond the loss of sky.

I next give a section diagram. It is a reduced copy of the original, which is shown on Plate 12. It will be seen that on the right hand the servient owner's wall has been raised. I show this by tinting the wall red. Now, to indicate the loss of rays, I show them by the red lines; the blue indicate the rays of light still left, and the black lines show the rays which were possessed, but which are now lost. The object of showing these in black is because their line would impinge on the opposite side of framework of skylight. It might be contended that they were of no value to dominant owner. They certainly have a different value to the rays shown blue. The contention was that the red lines were of the utmost value, because they fell, as will be seen on reference to the plate, on dispensing counter, and also on the bottles shown against the wall. It was contended that the loss of these rays (marked red) prevented accurate dispensing, and rendered the labels on the bottles illegible at proper distance, which had been legible before.

It would be easy enough to give illustrations from many other cases in which I have been engaged, but I cannot help thinking that if my reader has carefully studied the foregoing, he will not require any further illustrations. He must remember, however, that this is only one of the many methods of testing this very delicate subject of light and air.

We will now come to Part IV. and the last, in which we shall have to consider the method of defending our client's rights, and in which we shall find Table VII., setting out what the dominant owner's surveyor may try to prove, and, in Table VIII., important points for servient owner to direct his attention to.

## PART IV.

## THE FIGHT.

UNFORTUNATELY, even in this age of compromise, some clients will contest their rights by "trial of battle," the only difference being the "venue," which is now in the courts of law.

At times it is unquestionably necessary to have recourse to law ; but I think it is always wise to endeavour to arrange these questions, and for this purpose, no doubt, a meeting between the surveyors of the dominant and servient owners is the usual course of proceeding. But at such meeting it may be found either the dominant owner has such an exaggerated opinion of the value of "light and air," or the servient owner such an unappreciative idea of its value, that no course is open but to appoint an impartial umpire, or to take the case to trial.

Now, as to a *reference*. Although there is much to be advanced in its favour, it appears sometimes to be difficult to persuade clients to adopt this method of settling these questions ; partly, may it not be, because the proceeding is so quiet, and there is still a lingering love of the old age wherein a man was proud to declare he would fight for his rights (the modern equivalent probably being the vulgar expression, "have the law on him if it cost me my last penny,") and there is all the parade and show—the case set down for trial and in the "paper," and a reference to the daily paper to see how the case stands ; and the importance of the question, "Shall we be on to-day ?" the attendances at Court ; the



being present at consultations ; and then the trial itself, with the learned judge and the bar, the witnesses in attendance, the various surveyors engaged with plans and models. All these give an importance to the case, which the referee or umpire, *sitting* in his office and disposing of the matter in a quiet, business-like manner, cannot hope to rival. Further, may not (I put this intentionally in the interrogative form) the reason sometimes be that either the dominant or servient owner thinks he can better afford to fight than the other owner, and so hopes to force an unfair compromise ?

I would here remark that I cannot help thinking, however, that references to members of our profession would be much oftener made if our awards were given more quickly, and were based on deeper study of the law, so that those who submitted their cases to us would have the assurance that no prejudice, towards either all dominant owners or all servient owners, existed in our minds. I know how difficult it is to imbue ourselves with legal and logical feelings, and I therefore strongly recommend my readers to make a study of legal works ; and I can assure them that after a time they will find such study not nearly so dry as they now imagine it to be. Read reports of all trials bearing on this and all kindred subjects ; never lose an opportunity of listening to, and discussing questions with, *barristers* and *lawyers*. Of course, in doing so I need hardly mention that one must remember he is a *layman* ; but I know no gentlemen in any profession who are so willing to give information, or from whom one can obtain so much instruction, enlivened by so many amusing cases, trials, and anecdotes.

To show that my advice as to endeavouring to obtain what is called a "legal mind," distinguished by impartiality, is necessary, I need only quote the following as indicating its absence :—"I do not find architects so ready to keep to the defendant's side as I think they ought to be. I say it plainly. If a man comes to me with a defence, I take it up without inquiring any further ; but if he comes to me as the plaintiff,

or representing him, I must have it investigated before I will take it up at all. I will venture a little further, and say my experience has led me to this: that in nine cases out of ten these actions about light and air are based upon something very different from the sense of having suffered injustice. I state that deliberately and advisedly as my experience; and I think that if architects would do as I suggest—take up a defendant's case with alacrity, but take up a plaintiff's case with very considerable hesitation—they would not have to complain, as they do most justly, of the obstacles which are placed in the way of improving London and other large towns by these most mischievous actions." And again: "But if architects would hesitate a little more to come forward as witnesses against the business of brother architects, less harm would be done. 'Love me, love my building!' and those who put obstacles in the way of honest building ought not to be able to get architectural evidence to support their cases." This quotation is from the transactions of the Royal Institute of British Architects, and I leave my reader to refer thereto to find who was the speaker. Surely such a bias is not worthy a great reputation.

Well, we will assume all efforts at a compromise have failed, and you are instructed to prepare for the trial. Of course, for whichever side you are, either the dominant or servient, it matters not; your duty is clear to do the best you can for your client. In the preparation of your case it is wise to be prompt; in fact, taking a leaf out of the lawyer's book (who engage counsel at once, so as to secure the best man for the especial case), you should at once secure a surveyor who has given such cases his special study, and who, from practice in giving evidence, is not likely to fail in the witness-box. You will consult with him, and he will, no doubt, view with you the premises, and suggest to you the kind of drawings or models you should prepare, and the evidence you should get ready; and if the case is complicated, no doubt it will be to your client's in-

terest that an early meeting should take place with his solicitor.

Rest assured that you cannot too early get all prepared ; for, in any negotiation during the legal proceedings, you have all your strong points ready to advance, and you will know how to indicate the weak portions of your opponent's case, and will, therefore, be more likely to obtain favourable terms in settlement for your client.

I dwell somewhat on this because I have so often had to mention it when consulted. It is no uncommon occurrence for surveyors to come to me late in the afternoon, wanting me to see the premises the same evening, and give evidence the next morning. I must admit they offer liberal payment, and usually say they are very sorry that they could not give me longer notice ; and generally the reason assigned is that the client has been in expectation, to the last moment, of a settlement, and wanted to avoid any extra expense. They state they are aware it must much inconvenience my business, and they are instructed to pay any additional fee to induce the special business to be taken.

The reply I make will, I think, be obvious to my readers. It is, if I can take the matter, that unquestionably I will give it my earnest attention, but that I dislike special fees, preferring that my usual charges should be the only fees I make, and that, however heartily I may enter into the matter, they must see the disadvantage of not having time for mature consideration and the deliberate preparation of either models or diagrams.

It is an old adage that "good wine needs no bush"; yet after long experience, I venture to affirm that a good case is only "half the battle," and that many good causes are lost because they are not well "worked up," and are not thoroughly and clearly prepared for counsel and the Court. If such were not the case, why should solicitors be so anxious, in the interests of their client, to secure the leading men at the bar in the "specialty" by which they have made a repu-

tation? It is invidious to mention names, and also in a textbook it would be out of place, as name so rapidly succeeds name; but to-day I could at once name the counsel that both sides would be anxious to secure in any case of "Light and Air," "Compensations," or any legal matter connected with our profession.

Nothing pleases me more than to find my opponent very sanguine—to hear him talk of his case in the horsey phraseology as a "walk over"; nothing pleases me less than to hear my own side using the same expression; as, from long experience, I have found the expression is used too frequently by those who have not considered what can be advanced by the other side—who, in fact, have not weighed the *pros* and *cons* carefully, or who are prejudiced in their client's case (which they have made so thoroughly their own as to be incompetent to guide their client judiciously), or have some prejudice. Thus, they are rendered unfit to form a judicial and impartial decision.

That a surveyor should consult a brother professional in a difficulty appears to be the rational proceeding. Take any matter of personal interest, and do we not all have some friend, in whom we have confidence, whom we consult? Does not every one (except the egotist) feel, in a matter in which he is personally interested—and all who are earnest in their work must, to some extent, become biased in favour of their client's advantages—the great solace and security of an independent opinion? Again, is there not a great advantage in having a fresh and experienced mind brought to bear on the subject, which, from its being constantly before you, has only the side turned towards you that you have so long and so wearily contemplated?

So much as to the man you consult, and I will now assume you have found the man—that your client, and his solicitor, and yourself, and the "man" have consulted and arranged as to the drawings, models, and evidence. The next question is as to the "team," as it is called. I confess I prefer a few

good men to a larger number of lesser weight; and of course you are entitled to ask my reasons. My reasons are—1. Good men carry most weight; 2. As they are often appearing in the witness-box, they are less likely to answer awkward questions stupidly; 3. Men unaccustomed to the fearful ordeal are nearly sure to say something that they will admit they never meant in the sense the cross-examining counsel intended; 4. Because one witness breaking down or giving (through the misunderstanding of the question, in consequence of the nervousness attending his position) a wrong answer destroys, at least, two of your good witnesses—in fact, may entirely spoil your claim.

While on this portion of the subject, I ought to call attention to other than skilled witnesses. They comprise builders; inhabitants of the premises of the dominant and servient owners; assistants and shopmen; gentlemen who pursue the same profession or trade; persons who have known the premises before and since the injury alleged, including that not-to-be-got-rid-of individual—the oldest inhabitant.

Now, in dealing with this non-skilled evidence, it has been found very difficult, first, to obtain from the witnesses, before they go into the “box,” what they know (because they sometimes tell rambling stories, the date and pith of which it is difficult to discover); and when under clever cross-examination they seem to be so liable to forget what they have told, or their memory is so quickened by that trying process, that they say something for which you are quite unprepared, and which they tell you they had quite forgotten; or that they had become “fogged” and did not mean it.

You will assume that I incline to mature skilled witnesses. I affirm that they are less likely, under cross-examination, to say what they do *not* mean; but, of course, other evidence is often imperative, and I would only suggest that such evidence should be produced for what it is required, and that the professional, skilled, or technical evidence should be relied on as to injury or non-injury.

The points to consider I have endeavoured to express in the following Table. It sets out what the dominant owner will seek to prove, and if you are acting for the dominant owner, you will try to prove some or all of them.

TABLE VII.

*Showing what the dominant owner's surveyor may try to prove.*

The dominant owner will, no doubt, after proving his right to the easement, try to prove one or more of the following items:—

1. That his enjoyment of the premises is interfered with.
2. That his light is not merely slightly affected, but substantially injured.
3. That he cannot carry on his business as heretofore.
4. That he cannot carry on his business with the same convenience as heretofore.
5. That he cannot carry on his business without aid from artificial light.
6. That his premises are rendered unhealthy and unfit for habitation.
7. That the rental value is seriously diminished.
8. That the selling value is seriously affected.

Should these points, 7 and 8, be taken, it will be wise for the surveyor to be prepared with evidence and proof as to *quantum*.

Of course, the dominant owner must first prove that the light is an ancient light.

Having done so, he will try to prove *item 1*: That the enjoyment is interfered with; and to do so he will produce, probably, occupants, if the claim be in respect of a private residence, and the employés, if the premises be a shop or warehouse. In the former case, it is likely that it will be contended that serving cannot be done as late in the day, or that some one accustomed to use the needle cannot thread it without artificial light so many hours later in the morning or earlier in the evening. As to the latter, that colours cannot be distinguished, or cannot be distinguished after a certain time in the day in the summer and a certain time in

the day in winter; that dispensing cannot be carried on so conveniently or safely; that the shop is dingy and dark, and is rendered less attractive; that the premises are rendered less healthy by reason of the necessity of gas being burned during a greater period each day; that a special loss is sustained, as in certain trades no amount of artificial light (at present) can be a substitute for daylight.

*As to item 2.* I have shown in the preceding pages so clearly the necessity of proving that the injury is substantial, that it is almost certain the dominant owner's surveyor will endeavour to prove this.

*As to item 3.* Clearly, if this can be proved, the dominant owner will obtain relief; for the law is most jealous of allowing an injury of this kind, and certainly it is most just that this should be so.

*As to item 4.* I have often found much dispute as to this item, the word convenience seeming to have a different meaning in many witnesses' minds, although it would appear so clear.

*As to item 5.* It is safer ground, as it would only be necessary to show, on trustworthy evidence, that the gas was necessarily lighted at an earlier hour in the day, to support this.

*As to item 6.* This is somewhat difficult of proof while the system of sanitation and health is so much in dispute, and probably the surveyor advising the plaintiff would do well to have what is called a strong case before advising fighting on this count. It is well to remember, however, that the question of air, as well as light, is specially an element.

*As to item 7.* Here the surveyor is almost the sole judge, and certainly, if he be experienced, he can most properly determine whether or not any injury to the rental value or desirability of the premises has occurred.

*As to item 8.* This will in all probability follow *item 7*, and surveyors are again the best and almost only witnesses to support or rebut.

Having examined Table VII., and briefly pointed out the salient points requiring attention, we next come to Table VIII., and will follow it with a few suggestions.

TABLE VIII.

*Important points for surveyor of servient owner to direct his attention to.*

1. The length of time light enjoyed.
2. The use for which it has been enjoyed.
3. If any, and what, alteration has been made in the windows, skylights, or other lights.
4. If any interruption of the light has occurred.
5. If any alteration can be made in proposed building so as to give equivalent light (see case where angle cut off).
6. If any excess of light exists.  
As heavy blinds would indicate.
7. The quantity of injury—  
As if only trivial the Courts will not interfere by injunction, and may at the trial dismiss the action with costs. This is important to remember.
8. The aspect of the window or skylight interfered with.
9. The surrounding obstructions (if any), and the date, if it can be obtained, of their erection.
10. The kind of glass in the ancient light.

Naturally *item 1* will first engage the defendant surveyor's attention, and he will often find himself in great difficulty. Some will tell him, "Window only sixteen years old," or some number of years short of the prescribed time: and then he will have to find out why it is fixed at this time, and will discover a wedding, a birth, or death, or an accident to a child, or some such cause, has impressed it on informant's mind. It will require patience to test statements and arrive at the fact, and it must be borne in mind legal proof will be necessary if this is the defence, and not mere statement unsupported.

*As to item 2.* The present decisions, it must be remembered, appear to be in favour of no diminution. Still, it has been held that sufficient light for the use of which the



premises have been occupied is all that can be claimed, and it is therefore well to show (if it can be done, of course, is meant) that there is plenty of light for the use for which the premises have been used, and it would appear to have the effect of reducing damages where this can be shown.

*As to item 3.* I advise a careful perusal of the cases I have given *in extenso*—namely, *Tapling v. Jones*; *National and Provincial Plate Glass Insurance Company v. The Prudential Assurance Company*; and *Theed v. Debenham*.

These most important recent cases will certainly enable the surveyor to determine if, in the case he has to combat, he can successfully bring this item forward with advantage.

*As to item 4.* He will find the same difficulty as I have set out as to *item 1*, unless the interruption has taken place under his superintendence or that of some well-qualified surveyor, when no such difficulty can occur, as the date of obstruction, the watching and the written record will be all ready for production.

*As to item 5.* In the preceding portion of the work I have endeavoured carefully to explain that the dominant owner cannot be compelled to alter his premises; still it is important in estimating damage, and also in showing that the injury can be diminished, to indicate what can be done to the dominant owner's premises, and what the result will be. Although it may give the plaintiff an advantage (in giving him time to consider what reply and objection he may be able to set out against the proposed alteration of his premises), still it seems only fair, before the trial, to give him plans and estimates of the proposal. It is not always a disadvantage; for the Courts are very willing to consider most leniently that man's case who has done all he can to conciliate his neighbour, and does not want to oppose him or prepare surprises at the trial, but tells him fairly what he means to contend, and enables him, by giving him copies, to have plenty of time and opportunity of answering.

*As to item 6.* Many cases of this kind arise in my mind,

indicating that an excess of light existed. It is, however, open to the dominant owner to combat in several ways.

*As to item 7.* I would refer to the very recent case of *Davenport v. Ridsdale* (December 1878), in which I was engaged for the defence. In this case the premises in Fleet Street, at the corner of Salisbury Court, had been rebuilt, and the action was for injury of light; the decision adverse to plaintiff, with costs. Also I refer my reader to *Back v. Stacey*, already alluded to, to show it must be a substantial privation; also to Lord Justice James, in *Kelk v. Pearson*, already cited, and Lord Selborne's dictum. The loss must be substantial; each case must be judged by itself, and no one can form a decision without either seeing the drawings relating to the particular case, or, better still, the drawings and the ancient light stated to be affected.

*As to item 8.* This more especially arises in the case of those requiring north light, as in our profession, artists and sculptors, chemists and others.

*As to item 9.* This is difficult to explain without the special case before one, and yet in many cases the surrounding obstructions, which have become ancient through consent, negligence, or accident, may give especial value to the light sought to be injured.

*As to item 10.* So much have I heard in cases in which I have been engaged, that I feel bound to call attention to it. On the one side, it is contended that if a man has ground or "matted" glass, it indicates in itself that he has an excess of light, and takes that means of reducing it. On the other hand, it is contended that no such assumption is fair; that he may desire privacy, and that he is entitled thereto; that he may dislike a glare, and that this is the best remedy; that the diminution he has made to obtain one or other of these objects renders the remaining light more valuable to him; that consequently he cannot easily part with any portion of the remaining light. As to the quantity of light lost by ground, "matted," and other kinds of glass, I do not

propose to give a Table, for the different estimates I have heard give very different results.

I have now explained Tables VII. and VIII.

In preparing a new edition of this work, it has been considered desirable to add the latest typical cases of importance, and I have therefore prepared five plates of diagrams to illustrate those cases, which I think will be of greatest use and advantage to the reader, and I now proceed to explain them :—

The first of these cases, as shown on Plate 13, was the erection of an addition to a house in Westgate Road, at Newcastle-on-Tyne, in which it was alleged that no injury to the light and air of the adjoining house would occur. The new building is shown on the plan and elevation, tinted pink, and the lines of light which would be obstructed are shown in blue. This was a lengthy case, many diagrams and models being produced in court; but I do not give all these diagrams as they are unnecessary for the illustration of this case. The plan shown on Plate 13, with a sectional view, which I prepared with a perspective view, resulted in the Court granting a perpetual injunction against the building-owner, and thus my client continues to enjoy his light. One curious point I may mention was raised in this case, and that was, that the plan of the building had been approved by the Corporation, but of course this was no answer to my client's right to obtain an injunction, and the case was really fought out on the question of whether or not an injury to the light would occur, resulting eventually, as I have before said, in a perpetual injunction being granted, with costs.

The next case I illustrate is shown on Plate 14. It was a question of injury by the building of a School-board school in rear of 34 Bedford Row. The plan shows the old building and the new school building, the latter being tinted pink; the section also shows the old and new buildings, and the two offices which were considered injured. In this case a legal point arose, which I need not go into; suffice it to say, that

it was held that the claim could not arise till the year 1892, being therefore deferred nine years, and that the claimant's lease would then only leave thirteen and a-half years to run; this case was referred, and the referee awarded 20*l.* for the deferred injury, being for the period commencing 1892, and expiring 1906.

The next claim is one of more importance, because the case was tried out; and the trial lasted seven days, the question being, what was the injury caused by the building, marked A on plan, being raised 10 feet 3 inches above its former height, to the building marked B on the plan, and what effect such raising had on the light of these premises. Curiously enough the premises marked B on plan (the Old Yorkshire) had been set back; in the diagram the old front wall is shown in black; and it will be seen by the dotted red lines taken from the centre of the building called A on plan, that all the new windows in the new line of front of the building marked B on plan, would be obliterated, saving only one small portion of the second window. This is shown in the illustration by the hatching in black. There were in this case many witnesses called for the plaintiff, who alleged that this 10 feet 3 inches additional height much injured the premises, but the building owner of A gained the day, the Court holding there was no material injury of the light of B.

Plates 16 and 17 show the case I was recently called in to advise upon by the Inner Temple, and in which I was of opinion that great injury would result if the Temple Chambers Company, Limited, were allowed to build according to their designs. One peculiarity of the case is that the basements of King's Bench Walk are used as offices, and therefore the light to these rooms is important.

Plate 16 shows the back room on this floor, and the writing table is also shown, the lines of light that would be interfered with are drawn in blue, and coloured blue inside the room. It will be seen that the rays are those which touch the table, and are therefore valuable. On the ground-floor

the same method of illustration is used—see Plate 17—the table also being shown where it was the custom for it to be placed. In this case the Court granted the Inner Temple a perpetual injunction, with costs. In concluding I cannot, I think, do better than repeat the few remarks I made at the close of the first edition, and which I trust are, by the additional care and labour spent upon the present, rendered even more appropriate.

Years have passed since I first commenced this book. Professional interruptions occurred; then arose the necessity of rewriting what has been written, the reluctance to do so, the expectation that some one would supply the want; this disappointed, came the desire, never quite extinct probably, that my work on the subject should be the *text-book*. Friends and readers of my other works urging, I felt impelled to complete my labours, and trust I have produced a book, which, containing all the dry facts and legal decisions necessary, is written in such a style as shall tempt the beginner to read on; and that the Tables and diagrams will make it a work of reference to the practitioner.

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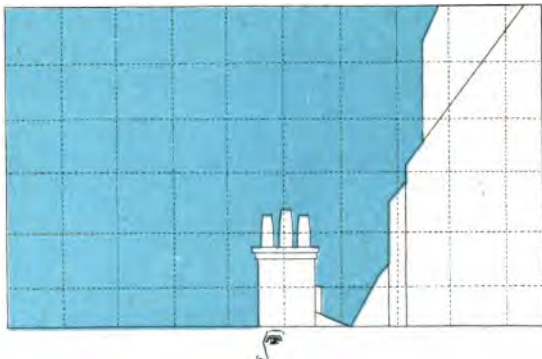
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THE END.



# AS IT WAS.

PLATE I.



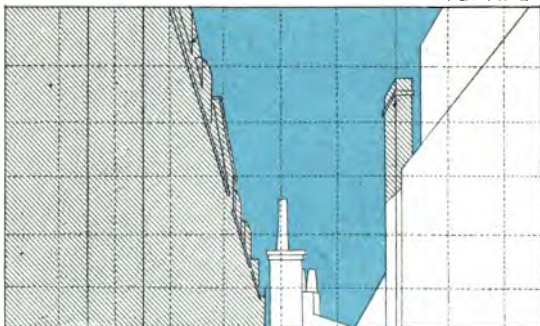
VIEW TAKEN FROM 1<sup>ST</sup> FLOOR WINDOW AT A HEIGHT  
OF 5'.3" FROM FLOOR, 1'.0" BACK FROM WINDOW.

**NOTE:** THE EYE 5'.3" FROM GROUND.  
THE BODY 1'.0" FROM WINDOW.



**AS IT IS.**

PLATE 2.



**LOSS OF SKY 60 PER CENT.**

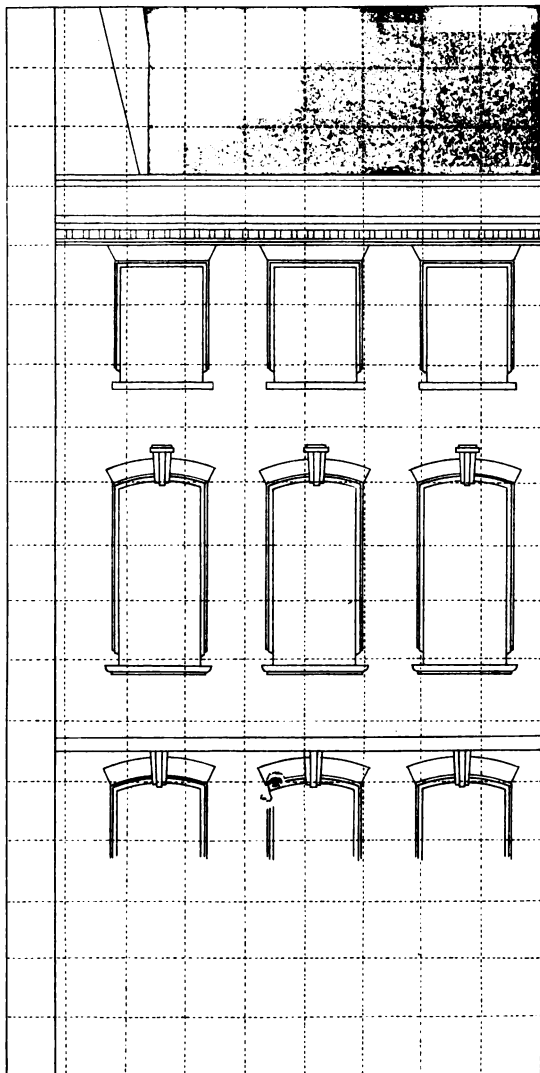
**VIEW TAKEN FROM 1<sup>ST</sup> FLOOR WINDOW AT A HEIGHT  
OF 5'3" FROM FLOOR, 1'0" BACK FROM WINDOW.**

**NOTE: THE EYE 5'3" FROM GROUND.  
THE BODY 1'0" FROM WINDOW.**



# AS IT WAS.

PLATE 3.



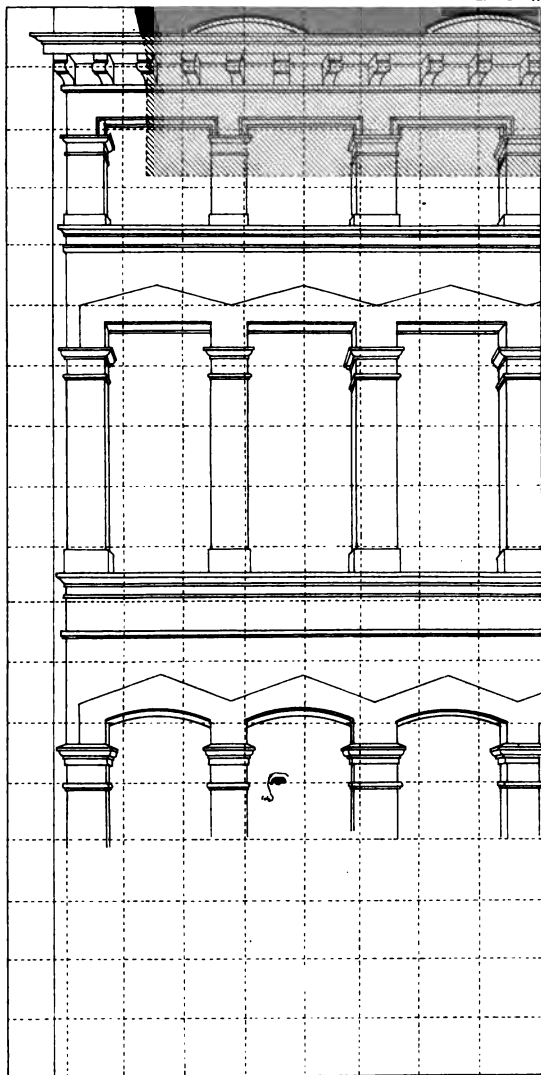
VIEW TAKEN FROM 1<sup>ST</sup> FLOOR WINDOW AT A HEIGHT  
OF 5'3" FROM FLOOR, 1'0" BACK FROM WINDOW.





AS IT IS.

PLATE 4.



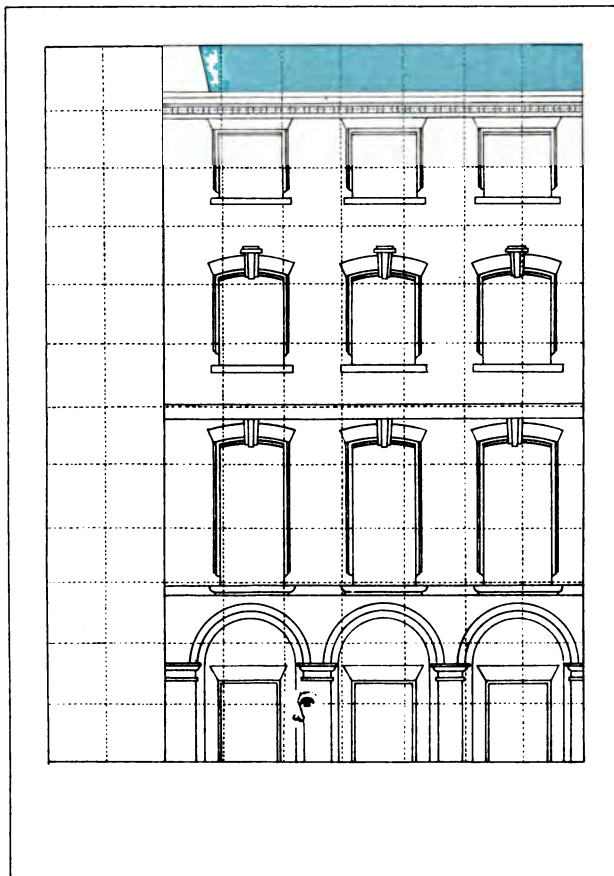
LOSS OF LIGHT 89 PER CENT.

VIEW TAKEN FROM 1<sup>ST</sup> FLOOR WINDOW AT A HEIGHT  
OF 5.3' FROM FLOOR. 1.0' BACK FROM WINDOW.



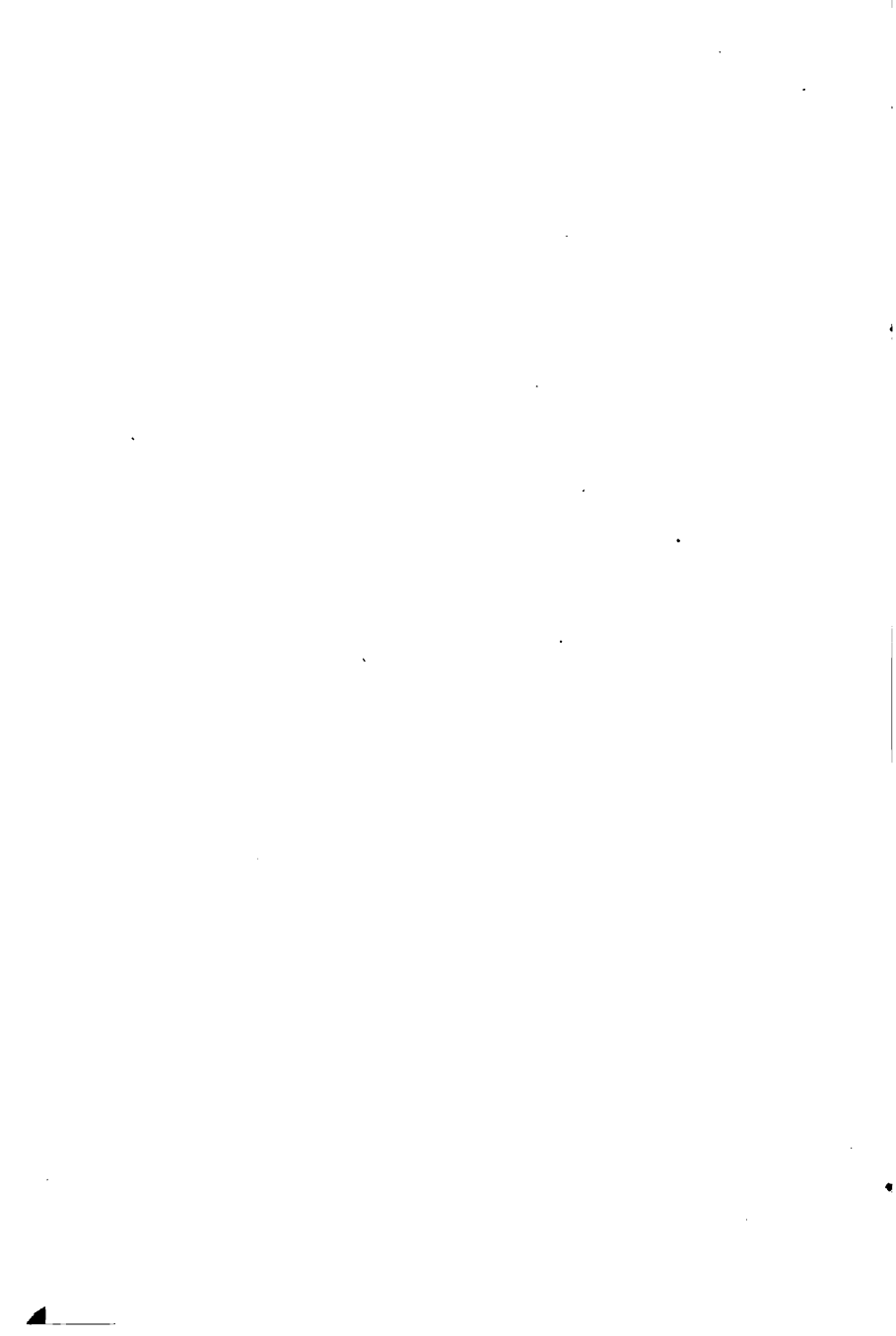
# AS IT WAS

PLATE 5.



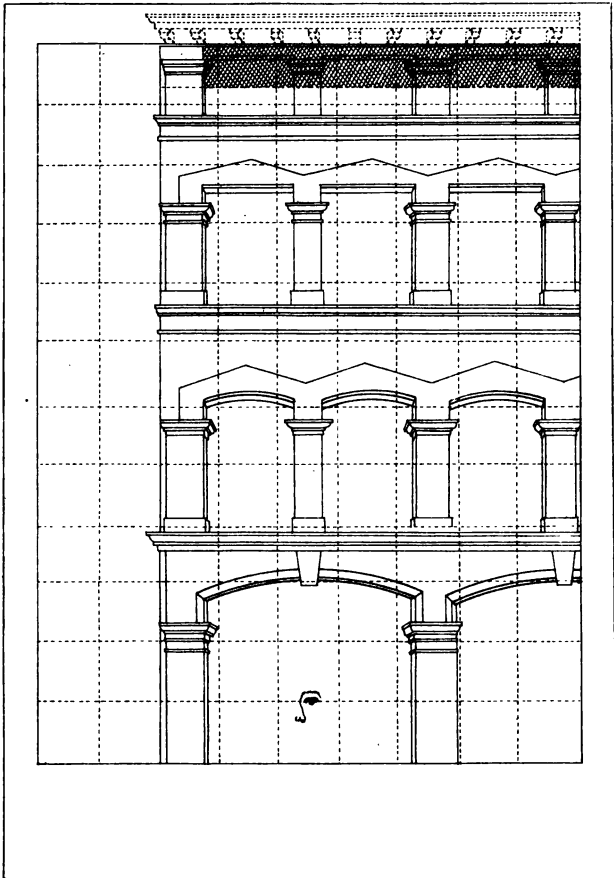
C F. Keil Lith

VIEW TAKEN FROM SHOP WINDOW AT A HEIGHT OF  
5'.3" FROM FLOOR AND 1'.0" BACK FROM WINDOW.



AS IT IS.

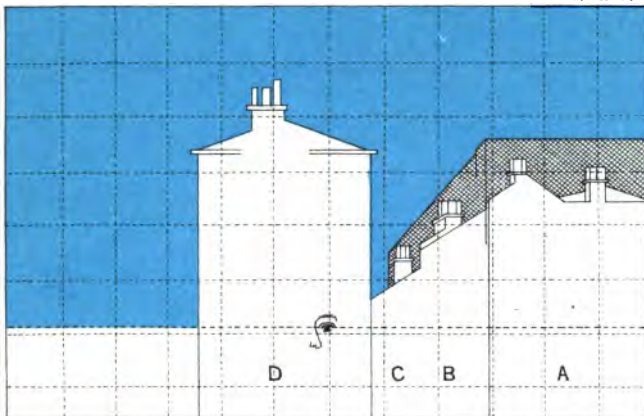
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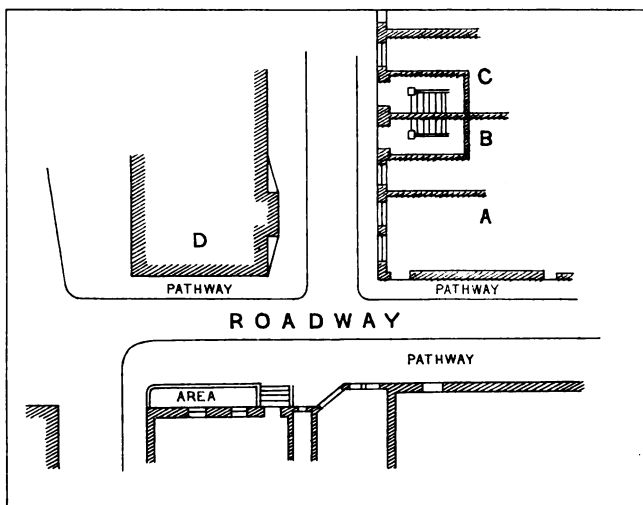
LOSS OF SKY TOTAL.

VIEW TAKEN FROM SHOP WINDOW AT A HEIGHT OF  
5.3 FROM FLOOR AND 1.0 BACK FROM WINDOW.





VIEW



PLAN

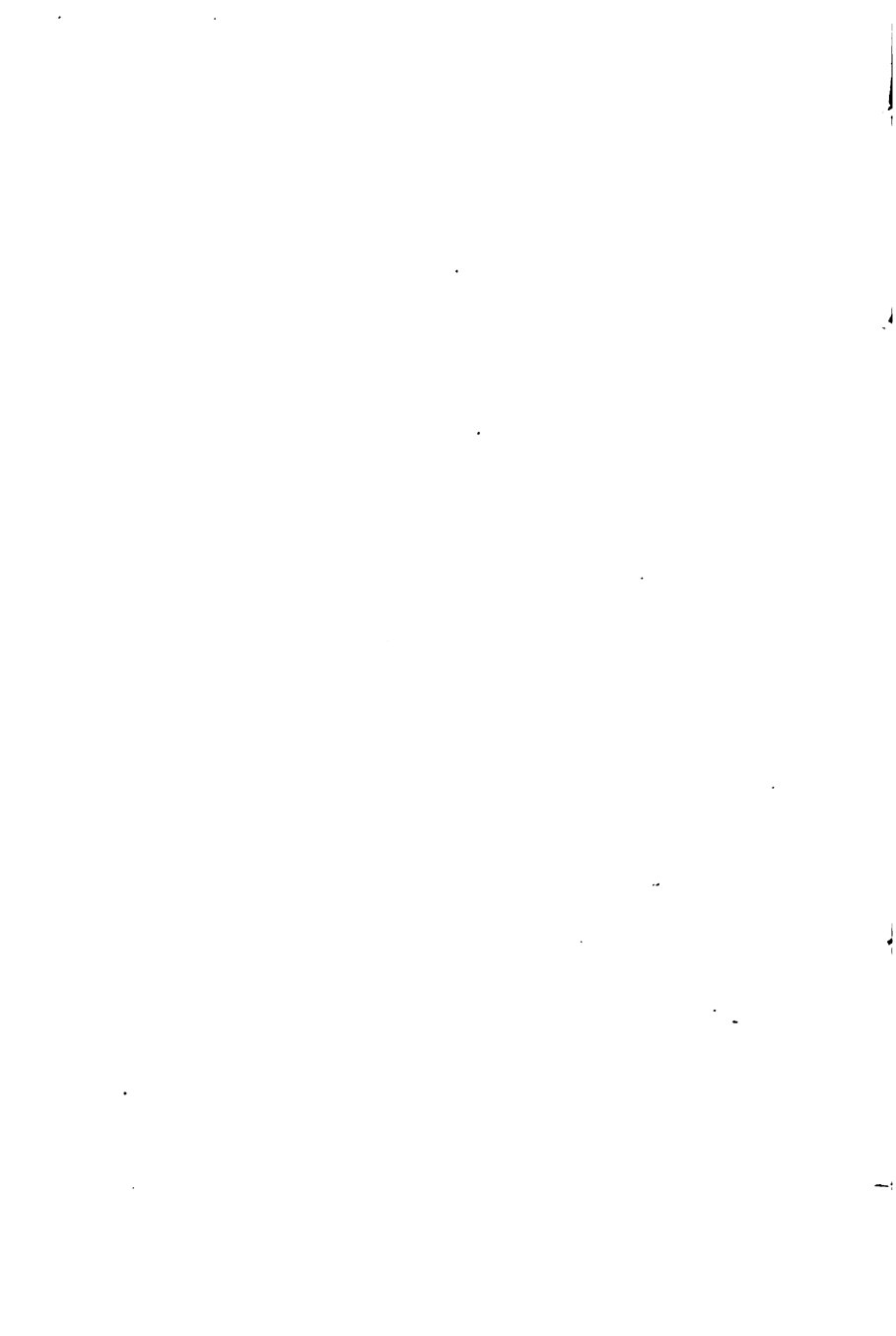






PLAINTIFFS PREMISES

DIAGRAM TAKEN 11.50 A.M. 1<sup>ST</sup> APRIL, 1878.

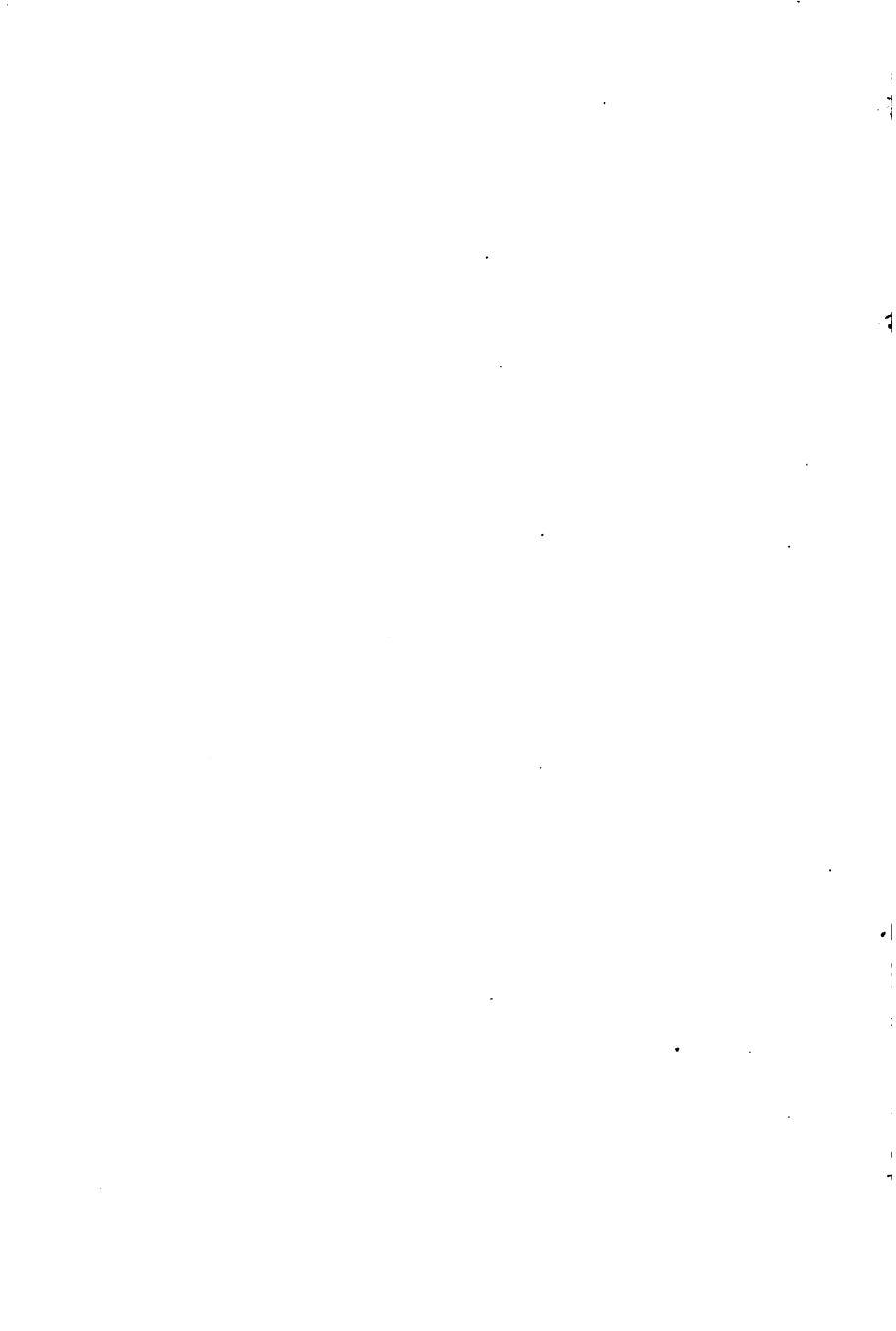




PLAINTIFFS' PREMISES.

C F Keil Lith

DIAGRAM TAKEN 11.25 A.M. 15<sup>TH</sup> APRIL, 1878.



AS IT WAS.

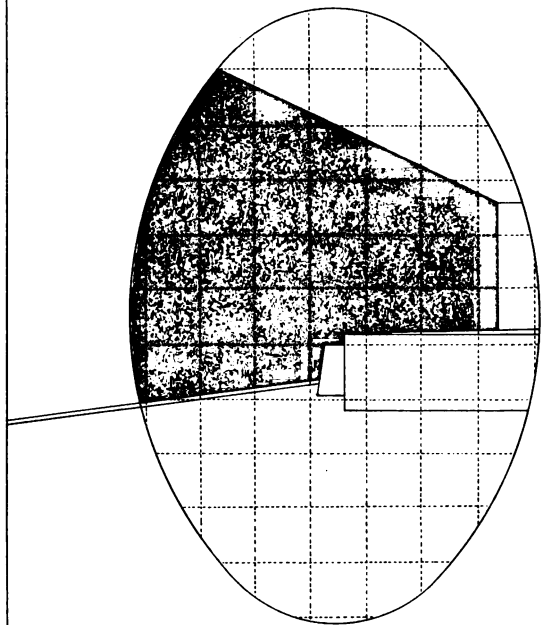
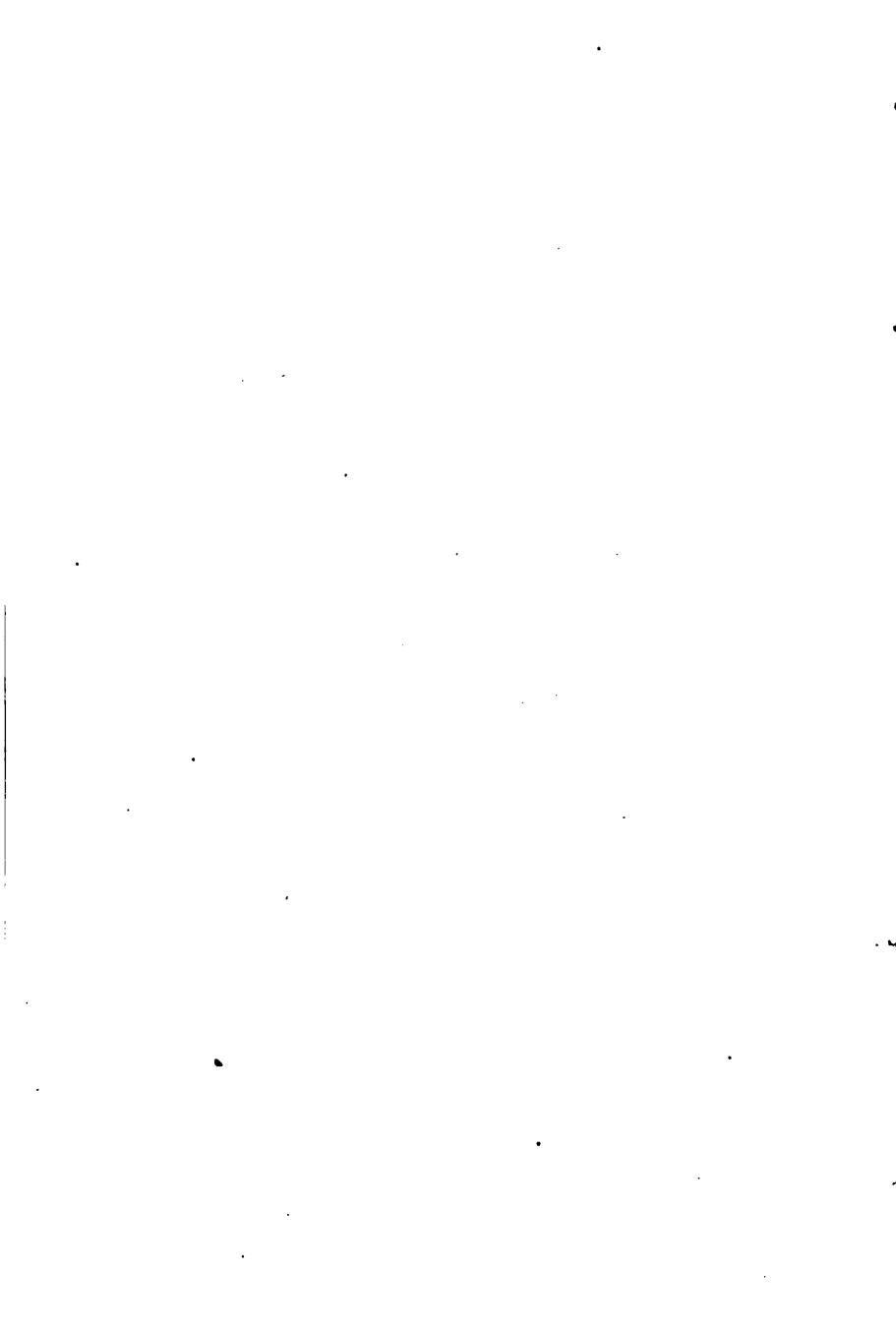


PLATE 10.

C.F. Keil Lith

VIEW TAKEN FROM BEHIND COUNTER IN SHOP LOOKING UP THROUGH SKYLIGHT.



AS IT IS.

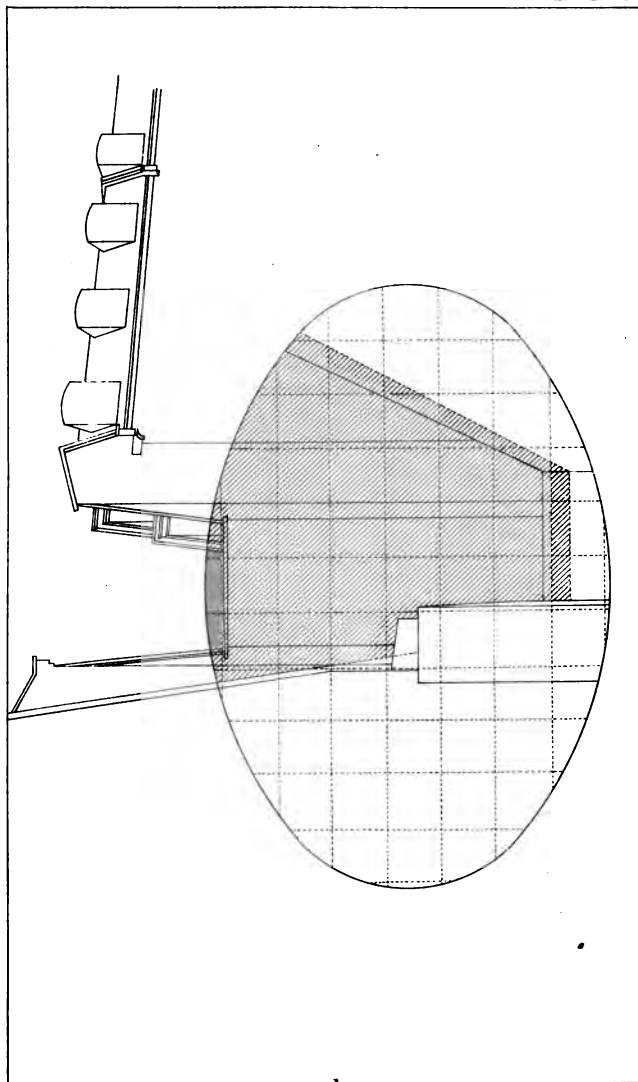


PLATE II.

C.F. Keil Lith.

LOSS OF SKY  $97\frac{1}{3}$  PER CENT.

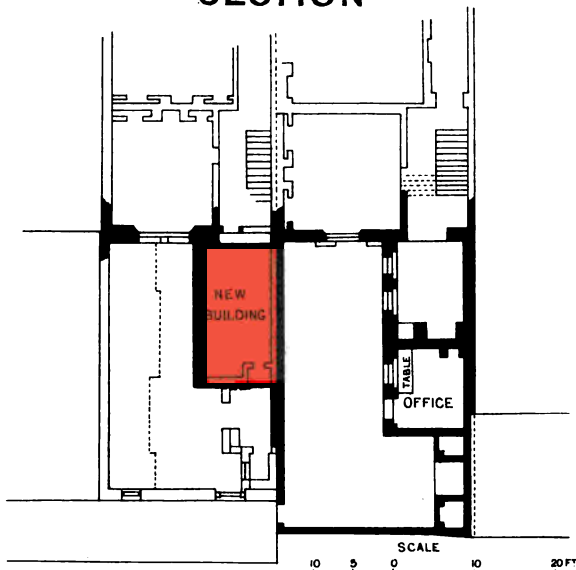
VIEW TAKEN FROM BEHIND COUNTER IN SHOP LOOKING UP THROUGH SKYLIGHT.



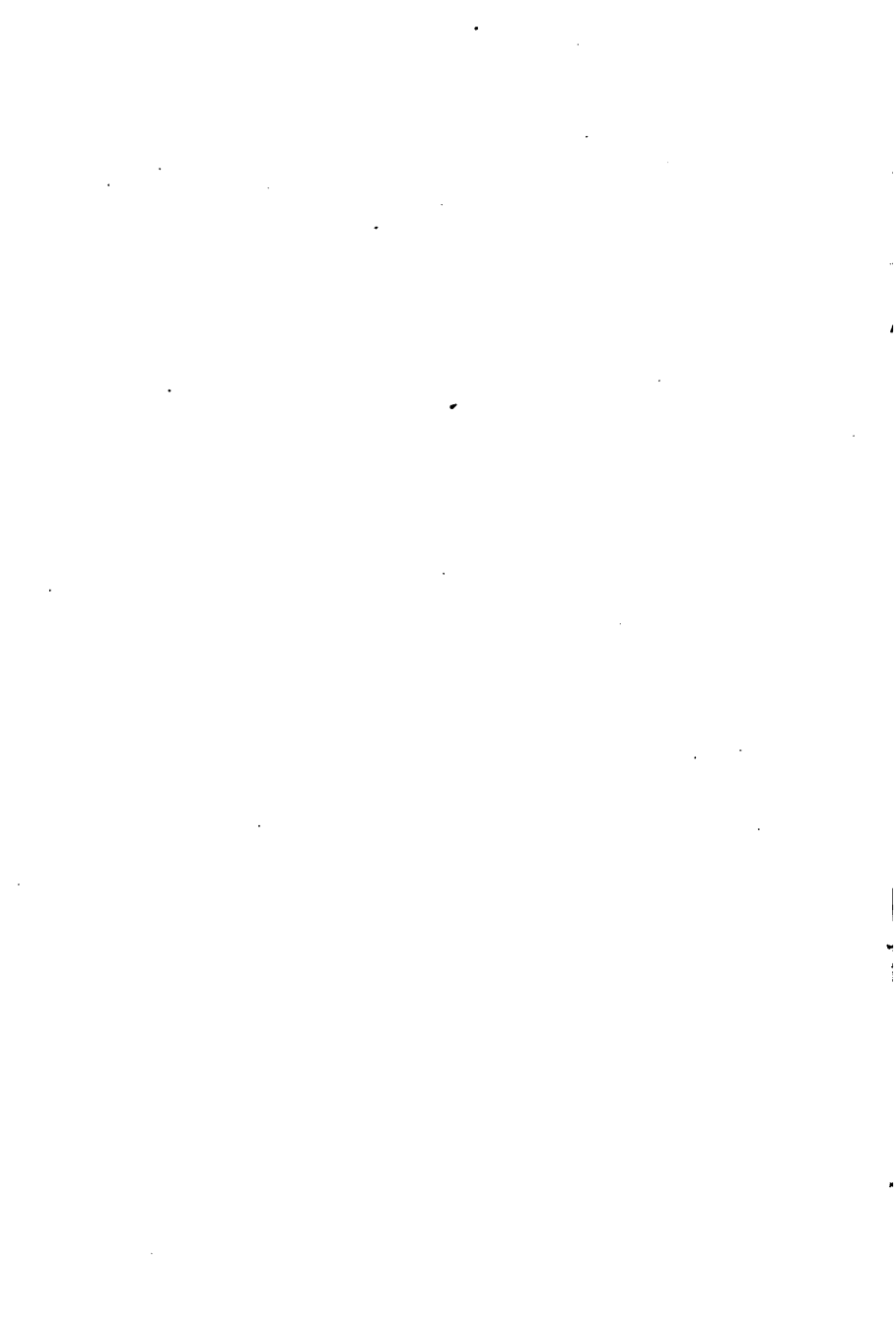


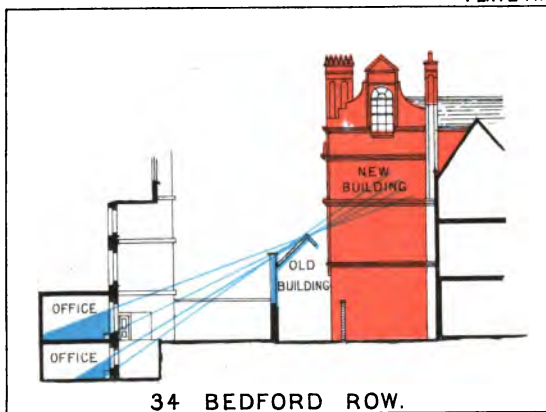


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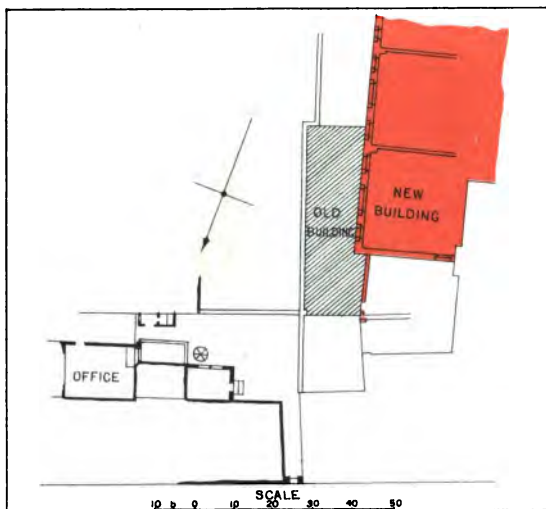


PLAN

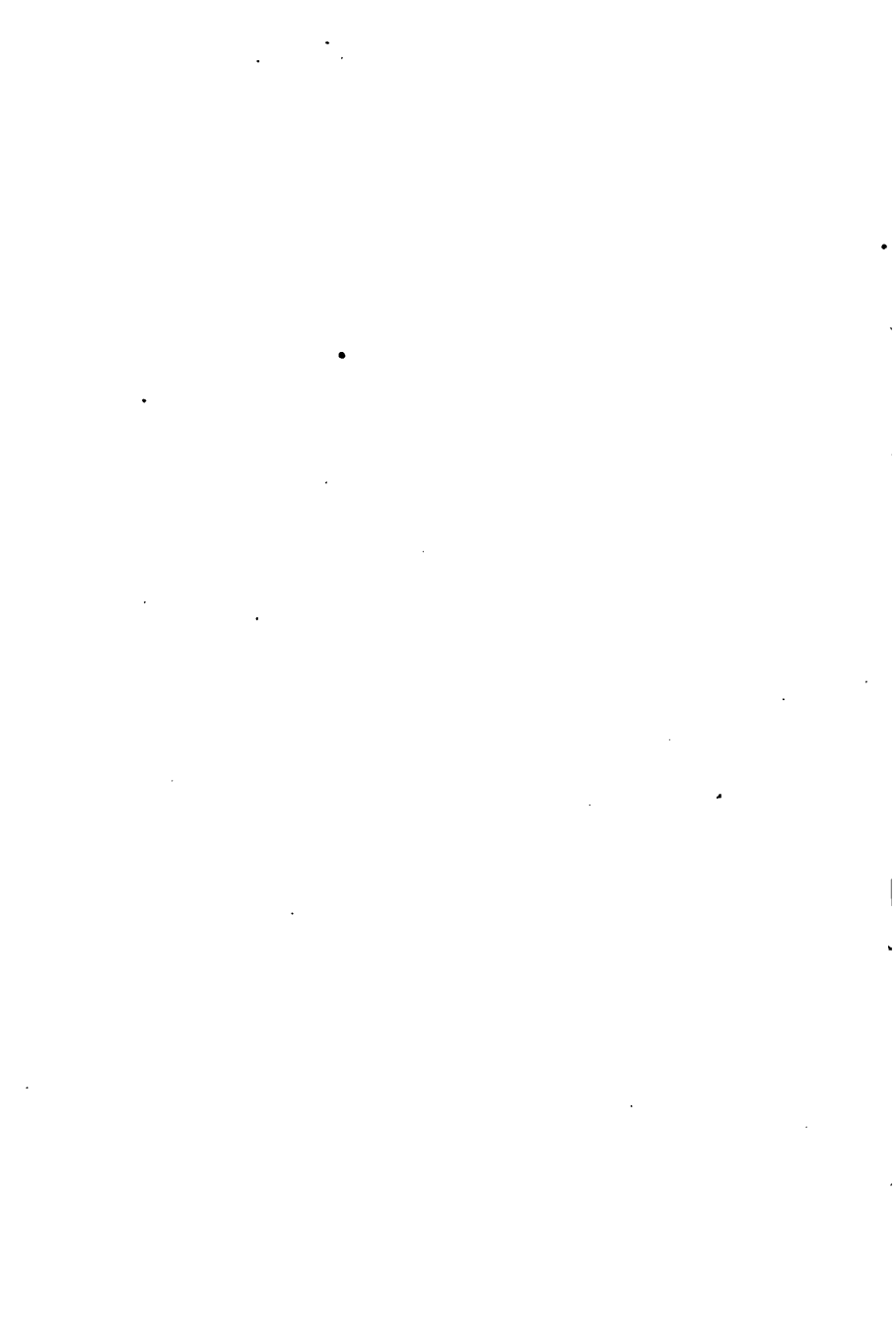


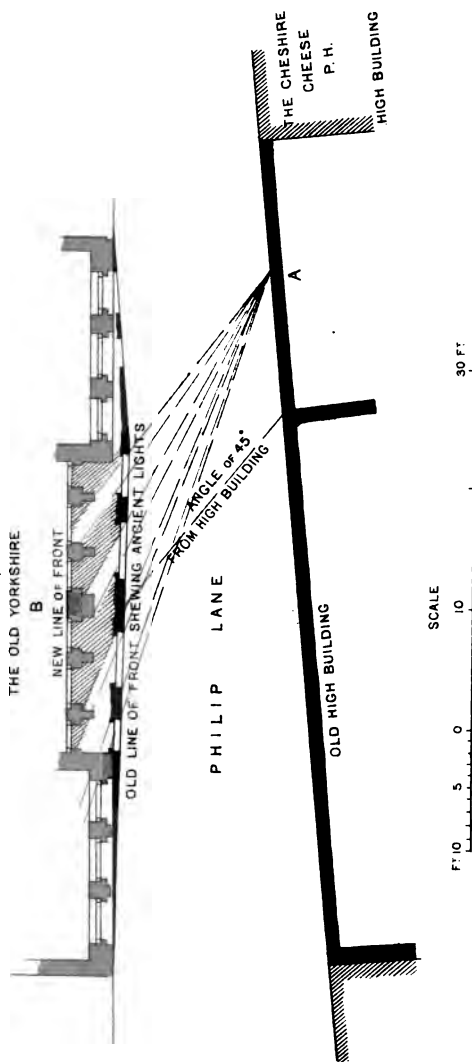


## SECTION

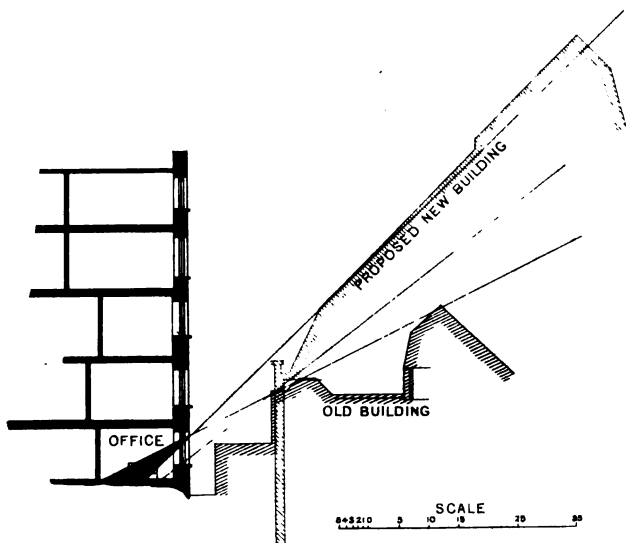


## PLAN









Nº 7 KINGS BENCH WALK

## SECTION

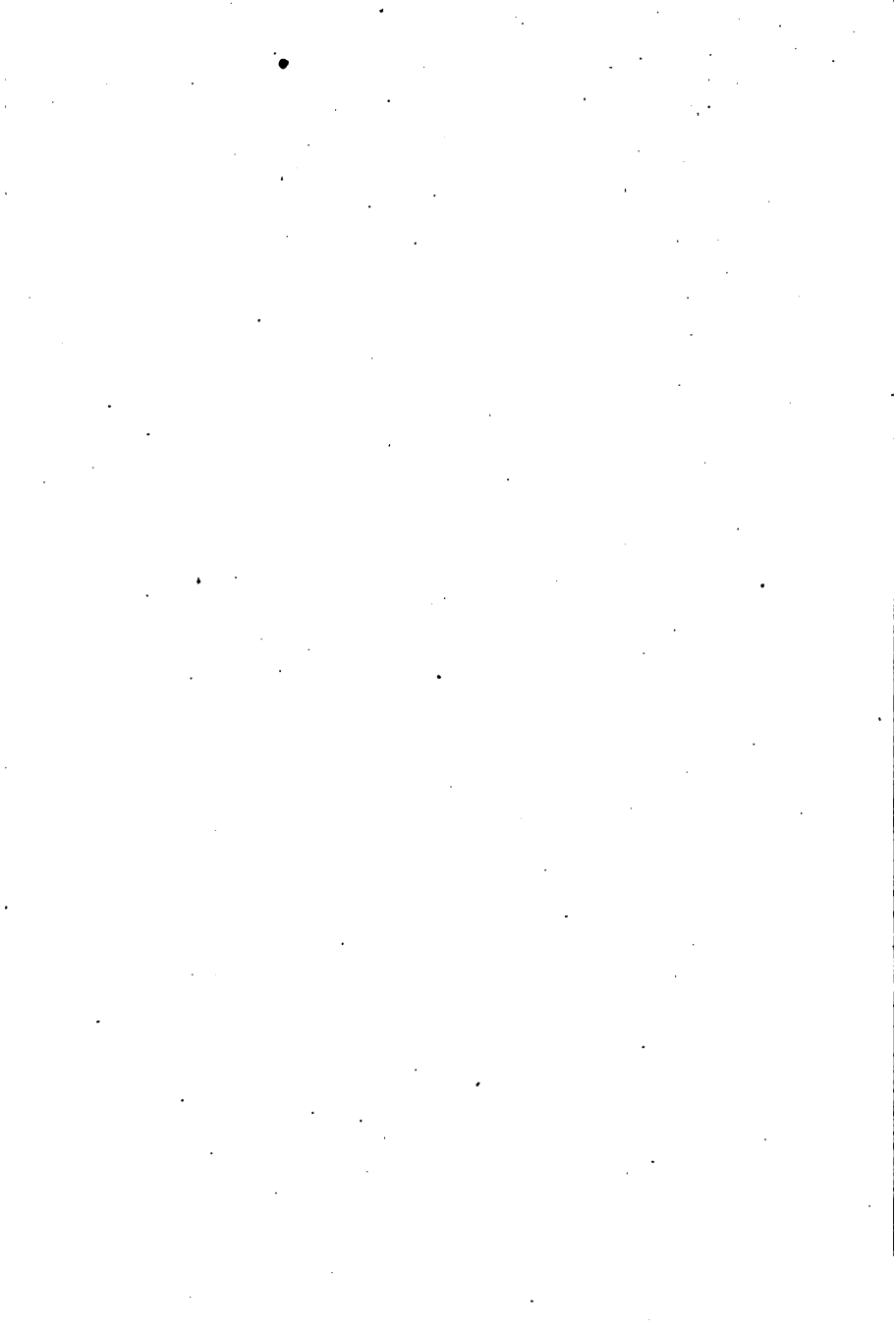
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